

(1)

No. 106, Original

Supreme Court, U.S.  
FILED

JUL 24 1986

JOSEPH E. SPANIOLO, JR.  
CLERK

IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, A.D., 1986

STATE OF ILLINOIS,

Plaintiff,

v.

COMMONWEALTH OF KENTUCKY,

Defendant.

- 
1. MOTION FOR LEAVE TO FILE COMPLAINT.
  2. COMPLAINT.
  3. BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT.
- 

NEIL F. HARTIGAN

Attorney General, State of  
Illinois

ROBERT V. SHUFF

First Assistant Attorney General  
500 South Second Street  
Springfield, Illinois 62706  
(217) 782-1090

Counsel of Record

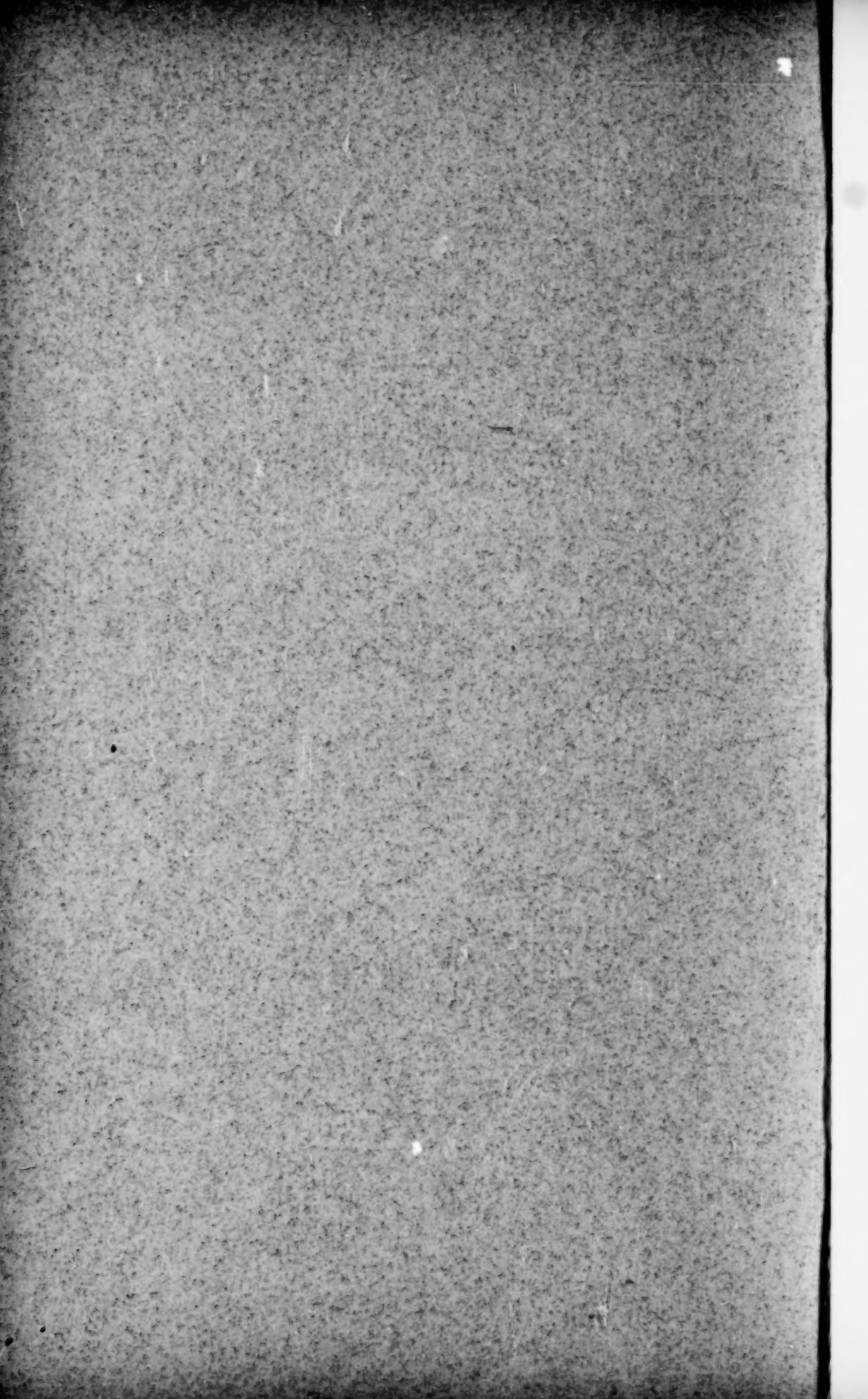
ROMA J. STEWART

Solicitor General, State of  
Illinois

DONNA DAGNALL

JOHN BRUNSMAN

Assistant Attorneys General  
Counsel for the State of  
Illinois





## TABLE OF CONTENTS

	Page
MOTION FOR LEAVE TO FILE COMPLAINT .....	1
COMPLAINT .....	2
BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT .....	7
Questions Presented .....	8
Jurisdiction .....	9
Constitutional Provision and Statutes Involved ..	9
Statement .....	10
Summary Of Argument .....	12
Argument I .....	13
The Boundary Dispute Between Illinois And Kentucky Presents A Justiciable Case Or Con- troversy Requiring The Exercise Of The Court's Original Jurisdiction	
Argument II .....	15
The Boundary Between Illinois And Kentucky Is The Low-Water Mark On The Northerly Shore Of The Ohio River As It Existed In 1792	
Conclusion .....	18
Appendix	
XI Hening's Va. St. at Large 326. Cession of Virginia .....	19
XI Hening's Va. St. at Large 571. Deed of Cession .....	22
3 Stat. 428 (1818). Illinois Enabling Act .....	27
XIII Hening's Va. St. at Large 19. Virginia- Kentucky Compact .....	32

## TABLE OF AUTHORITIES

### Cases:

	Page
<i>Massachusetts v. Missouri</i> , 308 U.S. 1 (1939) .....	12, 14
<i>Rhode Island v. Massachusetts</i> , 37 U.S. 657 (1939) ..	13, 14
<i>Handly's Lessee v. Anthony</i> , 18 U.S. 374 (1820) .....	13, 15, 16
<i>Indiana v. Kentucky</i> , 136 U.S. 479 (1890) ....	13, 15, 16, 17
<i>Ohio v. Kentucky</i> , 444 U.S. 335 (1980) .....	13, 16, 17
<i>Nebraska v. Ohio</i> , 143 U.S. 359 (1892) .....	15

### Constitutional Provisions:

U.S. Const. art. III, § 2, cl. 2 .....	2, 9, 12, 13
--	--------------

### Statutes:

28 U.S.C. § 1251(a) (1982) .....	2, 9, 10
Cession of Virginia, XI Hening's Va. St. at Large 326 (1783) .....	3, 10
Deed of Cession, XI Hening's Va. St. at Large 571 (1784) .....	3, 10
Illinois Enabling Act, 3 Stat. 428 (1818) .....	3, 10, 11
Virginia-Kentucky Compact, XIII Hening's Va. St. at Large 19 (1789) .....	4, 10, 11

**No.                      , Original**

---

**IN THE  
SUPREME COURT OF THE UNITED STATES**

---

**OCTOBER TERM, A.D., 1986**

---

**STATE OF ILLINOIS,**

**Plaintiff,**

**v.**

**COMMONWEALTH OF KENTUCKY,**

**Defendant.**

---

**MOTION FOR LEAVE TO FILE COMPLAINT**

---

**The State of Illinois, by its Attorney General, Neil F. Hartigan, respectfully asks leave of the Court to file its complaint against the Commonwealth of Kentucky, submitted herewith.**

**NEIL F. HARTIGAN**  
**Attorney General, State of Illinois**

**ROBERT V. SHUFF**  
**First Assistant Attorney General**  
**500 South Second Street**  
**Springfield, Illinois 62706**  
**(217) 782-1090**  
**Counsel of Record**

**ROMA J. STEWART**  
**Solicitor General, State of Illinois**

**DONNA DAGNALL**  
**JOHN BRUNSMAN**  
**Assistant Attorneys General**  
**Counsel for the State of Illinois**

**No. , Original**

---

**IN THE  
SUPREME COURT OF THE UNITED STATES**

---

**OCTOBER TERM, A.D., 1986**

---

**STATE OF ILLINOIS,**

**Plaintiff,**

**v.**

**COMMONWEALTH OF KENTUCKY,**

**Defendant.**

---

**COMPLAINT**

---

The State of Illinois, by its Attorney General, Neil F. Hartigan, brings this suit against the Commonwealth of Kentucky, and for its cause of action states:

**I.**

The Jurisdiction of this Court is invoked under Article III, Section 2, Clause 2, of the Constitution of the United States and Section 1251(a), Title 28, United States Code.

**II.**

Plaintiff, the State of Illinois, was admitted to the Union on December 3, 1818 and has been from that day to the present a State of the United States.

**III.**

Defendant, the Commonwealth of Kentucky, was admitted



to the Union on June 1, 1792 and has been from that day to the present a State of the United States.

#### IV.

The State of Illinois and the Commonwealth of Kentucky were formed from territory originally claimed by the Commonwealth of Virginia.

#### V.

On December 20, 1783, the legislature of Virginia passed "An Act to authorize the delegates of this State in Congress to convey to the United States, in Congress assembled, all the rights of the Commonwealth to the territory northwestward of the river Ohio." XI Hening's Va. St. at Large, 326.

#### VI.

Pursuant to this Act, the Virginia delegates in Congress executed a formal Deed of Cession on March 1, 1784, transferring to the United States all the right, title and claim which Virginia had to the territory "situate, lying and being to the northwest of the river Ohio" (XI Hening's Va. St. at Large, 571), which transfer is known as the Cession of Virginia.

#### VII.

Pursuant to "An Act to enable the people of the Illinois territory to form a constitution and state government, and for the admission of such state into the Union on an equal footing with the original states" [the Illinois Enabling Act], enacted by Congress on April 18, 1818 (3 Stat. 428 (1818)), Plaintiff, the State of Illinois, was created from part of the territory ceded to the United States by Virginia.

#### VIII.

Pursuant to the Illinois Enabling Act, the boundary between the State of Illinois and the Commonwealth of Kentucky is a line running from the confluence of the Mississippi river and

the Ohio river, "up the latter river, along its north-western shore, to the [mouth of the Wabash River]."

#### IX.

The Commonwealth of Kentucky was created by the separation of the district of Kentucky from the Commonwealth of Virginia as authorized in "An Act concerning the erection of the district of Kentucky into an independent state" (XIII Hening's Va. St. at Large, 19), passed by the Virginia legislature on December 18, 1789. This Act is known as the Virginia-Kentucky Compact.

#### X.

The Commonwealth of Kentucky, upon becoming a State, acquired no greater territorial rights along the Ohio river than those retained by Virginia between the Cession of Virginia and June 1, 1792, the date of Kentucky's admission to the Union.

#### XI.

The northern boundary of the Commonwealth of Kentucky, as established from the Cession of Virginia, the Virginia-Kentucky Compact and decisions of this Court, is the low-water mark on the northerly shore of the Ohio river as it existed in 1792.

#### XII.

During this century dams have been constructed in the Ohio river which have permanently raised the level of the river above its level in 1792.

#### XIII.

As a result of the raising of the level of the Ohio river, the present low-water mark on the northerly side of the river is farther north than the 1792 low-water mark.

#### XIV.

Plaintiff, the State of Illinois, asserts that its boundary with

the Commonwealth of Kentucky follows the 1792 low-water mark on the northerly side of the Ohio river.

#### XV.

The Commonwealth of Kentucky, through the acts and statements of its officials, claims that Kentucky's boundary with Illinois is along the present low-water mark on the northerly shore of the Ohio river, rather than the 1792 low-water mark.

#### XVI.

By claiming the present low-water mark as its boundary with Illinois, Kentucky seeks to exercise sovereignty over territory to the north of the 1792 low-water mark, which territory Illinois asserts is within its boundaries.

#### XVII.

The assertion of jurisdiction by the Commonwealth of Kentucky over territory north of the 1792 low-water mark is a direct infringement upon the sovereignty of the State of Illinois.

#### XVIII.

Plaintiff, the State of Illinois, has no adequate remedy at law and the questions of sovereignty and jurisdiction herein presented have not been resolved by this Court between the State of Illinois and the Commonwealth of Kentucky.

WHEREFORE, Plaintiff, the State of Illinois, prays that the Commonwealth of Kentucky be required to answer the matters herein set forth and that, upon a final hearing on the merits, this Court enter an order and decree:

1. Declaring the boundary line between the State of Illinois and the Commonwealth of Kentucky to be the low-water mark on the northerly shore of the Ohio River as it existed in 1792;
2. Perpetually enjoining the Defendant from disturbing in any manner the State of Illinois or its citizens from the peaceful

use, and enjoyment of all land, water and jurisdiction within the boundaries of Illinois as established by the Court; and

3. Granting such other relief as this Court may deem just and proper.

/s/ Robert V. Shuff  
First Assistant Attorney General  
500 South Second Street  
Springfield, Illinois 62706  
217-782-1090  
Counsel of Record

July 21, 1986



**No. , Original**

---

**IN THE  
SUPREME COURT OF THE UNITED STATES**

---

**OCTOBER TERM, A.D., 1986**

---

**STATE OF ILLINOIS,**

**Plaintiff,**

**v.**

**COMMONWEALTH OF KENTUCKY,**

**Defendant.**

---

**BRIEF IN SUPPORT OF MOTION FOR  
LEAVE TO FILE COMPLAINT**

---

**NEIL F. HARTIGAN**  
Attorney General, State of Illinois

**ROBERT V. SHUFF**  
First Assistant Attorney General  
500 South Second Street  
Springfield, Illinois 62706  
(217) 782-1090  
Counsel of Record

**ROMA J. STEWART**  
Solicitor General, State of Illinois

**DONNA DAGNALL**  
**JOHN BRUNSMAN**  
Assistant Attorneys General  
Counsel for the State of Illinois

**QUESTIONS PRESENTED**

1. Does a dispute between two States of the United States over their mutual boundary present a justiciable case or controversy for this Court?
2. What is the boundary line between the State of Illinois and the Commonwealth of Kentucky?

**No.                      , Original**

---

**IN THE  
SUPREME COURT OF THE UNITED STATES**

---

**OCTOBER TERM, A.D., 1986**

---

**STATE OF ILLINOIS,**

**Plaintiff,**

**v.**

**COMMONWEALTH OF KENTUCKY,**

**Defendant.**

---

**BRIEF IN SUPPORT OF MOTION FOR  
LEAVE TO FILE COMPLAINT**

---

**JURISDICTION**

The jurisdiction of this Court is invoked under Article III, Section 2, Clause 2 of the Constitution of the United States and under Title 28, United States Code, Section 1251(a).

**CONSTITUTIONAL PROVISIONS AND  
STATUTES INVOLVED**

U.S. Const., art. III, § 2, cl. 2.

In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction.

28 U.S.C. 1251(a). Original Jurisdiction.

The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

XI Hening's Va. St. at Large 326. Cession of Virginia.\*

XI Hening's Va. St. at Large 571. Deed of Cession.\*

3 Stat. 428 (1818). Illinois Enabling Act.\*

XIII Hening's Va. St. at Large 19. Virginia-Kentucky Compact.\*

---

\* The text of these provisions may be found in the Appendix to this Brief.

### STATEMENT

This is a suit under the Court's original and exclusive jurisdiction seeking to resolve a dispute between the State of Illinois and the Commonwealth of Kentucky as to the location of their mutual boundary along the Ohio river.

The State of Illinois and the Commonwealth of Kentucky were created from territory originally claimed by the Commonwealth of Virginia. During the Revolutionary War, a dispute arose over the claims made by various states to the vast areas of unsettled land in the west, including that claimed by Virginia north and west of the Ohio river. In order to resolve the matter, Congress, in 1780, passed a resolution urging the various claimants to these western lands to relinquish to the United States any claim they might have.

In response to this request, the legislature of Virginia, on December 20, 1783, authorized the cession to the United States of its claim to all territory "situate, lying and being, to the northwest of the river Ohio." This transfer, known as the Cession of Virginia,<sup>1</sup> was formalized by a Deed of Cession exe-

---

1. "An Act to authorize the delegates of this State in Congress to convey to the United States, in Congress assembled, all the rights of the Commonwealth to the territory northwestward of the river Ohio." XI Hening's Va. St. at Large, 326.



cuted by Virginia's delegation to Congress on March 1, 1784. XI Hening's Va. St. at Large, 571.

Pursuant to the Illinois Enabling Act, enacted by Congress on April 18, 1818,<sup>2</sup> Plaintiff, the State of Illinois, was formed from part of the territory ceded by Virginia. According to the terms of the Illinois Enabling Act, Illinois' boundary with Kentucky was to run along the "north-western shore" of the Ohio river.

The Commonwealth of Kentucky was created from the District of Kentucky, a portion of the territory retained by Virginia after the Cession of Virginia. The formation of the new state was originally authorized by the Virginia-Kentucky Compact, passed by the Virginia legislature on December 18, 1789.<sup>3</sup> In admitting Kentucky to the Union, Congress adopted as its boundaries those of the district of Kentucky as they existed on December 18, 1789. (See 1 Stat. 189 (1791)). Therefore, Kentucky's northern boundary is the Ohio river, that being the northern boundary of the territory retained by Virginia after its cession of 1784 and the northern boundary of the district of Kentucky as it existed on December 18, 1789.

The State of Illinois asserts that its boundary with the Commonwealth of Kentucky, as has been determined with respect to the other States bordering Kentucky to the north, is the low-water mark on the northerly shore of the Ohio river as it existed at the time of Kentucky's admission to the Union in 1792. The Commonwealth of Kentucky, however, claims that the boundary is the present low-water mark on the northerly shore of the Ohio river.

During the course of this century, dams have been constructed on the Ohio river which have caused the level of the

---

2. "An Act to enable the people of the Illinois territory to form a constitution and state government, and for the admission of such State into the Union on an equal footing with the original states." 3 Stat. 428 (1818).

3. "An Act concerning the erection of the district of Kentucky into an independent state." XIII Hening's Va. St. at Large, 19.

river to rise significantly over the level of the river in 1792. As a result, the northerly low-water mark of 1792 has been submerged and the present low-water mark is to the north of the 1792 low-water mark.

The Commonwealth of Kentucky by the actions of its officials and employees has sought to assert the present low-water mark as its boundary with Illinois. For example, Kentucky has attempted to require all Illinois residents who desire to fish in the Ohio river to obtain Kentucky fishing licenses, regardless of whether they are fishing to the north or south of the 1792 low-water mark. Further, Kentucky wardens have ignored even the present low-water mark by seeking to enforce the hunting and fishing laws of Kentucky up to the northerly shore, regardless of the river's level.

Similarly, Kentucky has attempted to require all Illinois residents who own boats docked along the northerly shore of the Ohio river to have Kentucky boating licenses, without reference to the location of such boats vis-a-vis the 1792 low-water mark.

Kentucky by claiming and asserting jurisdiction up to the present low-water mark and beyond has sought to divest Illinois of territory properly belonging within its boundaries. Furthermore, Kentucky's attempted exercise of police, regulatory and taxing powers over the area to the north of the 1792 low-water mark is a direct denial of the sovereign rights of the State of Illinois over its own territory.

### **SUMMARY OF ARGUMENT**

1. A justiciable "case" involving a State exists for purposes of Article III, Section 2, clause 2 of the United States Constitution if the complaining State has suffered a wrong at the hands of a second State or asserts a right against another State which furnishes grounds for judicial relief under accepted principles of common law or equity. *Massachusetts v. Missouri*, 308 U.S.

1, 15, 60 S. Ct. 39, 84 L. Ed. 3 (1939). A boundary dispute between States presents such a case requiring the exercise of the Court's original jurisdiction. *Rhode Island v. Massachusetts*, 37 U.S. 657, 9 L. Ed. 1233 (1838).

2. The boundary line between the State of Illinois and the Commonwealth of Kentucky is the low-water mark on the northerly shore of the Ohio river as it existed in 1792, upon Kentucky's admission to the Union. This has been clearly established by prior decisions of this Court in *Handly's Lessee v. Anthony*, 18 U.S. 374, 5 L. Ed. 113 (1820), *Indiana v. Kentucky*, 136 U.S. 479, 10 S. Ct. 1051, 34 L. Ed. 329 (1890), and *Ohio v. Kentucky*, 444 U.S. 335, 100 S. Ct. 588, 62 L. Ed. 2d 530 (1980).

The State of Illinois takes the position that the same reasoning which led this Court to find Kentucky's boundary with Indiana and Ohio to be the 1792 low-water mark is equally applicable to the determination of its boundary with Illinois. In this regard, Illinois notes that the Court in *Ohio v. Kentucky*, 444 U.S. at 339 rejected Kentucky's argument that the Court's earlier adoption of the 1792 low-water mark in *Indiana v. Kentucky* did not support the selection of the same boundary between Kentucky and Ohio.

## ARGUMENT

### I.

#### **THE BOUNDARY DISPUTE BETWEEN ILLINOIS AND KENTUCKY PRESENTS A JUSTICIABLE CASE OR CONTROVERSY REQUIRING THE EXERCISE OF THE COURT'S ORIGINAL JURISDICTION.**

The language of Article III, Section 2, Clause 2 of the Constitution of the United States gives original jurisdiction to this Court "In all cases \* \* \* in which a State shall be a Party \* \* \*." In order to determine if a particular dispute constitutes a justiciable "case" within the meaning of the Constitution, the Court has found that the complaining State must suffer an apparent

wrong as a result of the second State's action which furnishes grounds for judicial redress or that it asserts a judicially enforceable right under accepted principles of common law or equity. *Massachusetts v. Missouri*, 308 U.S. 1, 15, 60 S. Ct. 39, 84 L. Ed. 3 (1939).

Plaintiff, the State of Illinois, submits that a boundary dispute such as that involved in this case is, without doubt, a Constitutionally justiciable "case" between States, requiring the exercise of the Court's original jurisdiction. Indeed, there has been no serious doubt on this score since the Court first addressed this question in *Rhode Island v. Massachusetts*, 37 U.S. 657, 9 L. Ed. 1233 (1838).

The Court undertook a lengthy jurisdictional analysis in that case, concentrating on the derivation of the judicial power under the Constitution in conjunction with a discussion of those attributes of sovereignty retained and surrendered by the States under the Constitution. 37 U.S. at 720-731. The Court noted that the power to resolve a boundary dispute in the manner normally available to sovereigns had been surrendered by the States and concluded that an original action before this Court was the only Constitutional means available for legally resolving such a dispute between States. 37 U.S. at 726.

In the case at bar, Plaintiff, the State of Illinois, relying on the decisions of this Court, asserts that its boundary with Defendant, the Commonwealth of Kentucky, is the 1792 low-water mark on the northerly shore of the Ohio river. Defendant, the Commonwealth of Kentucky, claims the present low-water mark, despite the decisions of this Court.

Plaintiff, therefore, submits that a boundary dispute clearly exists between the parties and the case and can only be resolved by the exercise of this Court's original jurisdiction.



## II.

**THE BOUNDARY BETWEEN ILLINOIS AND KENTUCKY IS THE LOW-WATER MARK ON THE NORTHERLY SHORE OF THE OHIO RIVER AS IT EXISTED IN 1792.**

The first case in which this Court dealt with the issue of Kentucky's northern boundary was *Handly's Lessee v. Anthony*, 18 U.S. 374, 5 L. Ed. 113 (1820). In that case Chief Justice Marshall first recognized that the Ohio river boundary between Kentucky and its northerly neighbors was not a usual river boundary between States, involving the so-called *thalweg* doctrine and the principles of accretion and avulsion. (See e.g., *Nebraska v. Iowa*, 143 U.S. 359, 12 S. Ct. 396, 36 L. Ed. 186 (1892)). In his opinion, Chief Justice Marshall stated:

"When a great river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one State is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly-created State extends to the river only. The river, however, is its boundary." 18 U.S. at 379.

Since Virginia had claimed title to the territory on both sides of the Ohio river, the Court concluded that, when Virginia ceded the area to the northwest of the river, it retained the river up to the northerly low-water mark within its domain.

The first original action between States involving Kentucky's Ohio river boundary was *Indiana v. Kentucky*, 136 U.S. 479, 10 S. Ct. 1051, 34 L. Ed. 329 (1890). Interestingly, it was Kentucky in that case which took the position being espoused by Illinois in the present controversy: that Kentucky's boundary along the Ohio river is the low-water mark as of the date of its admission to the Union in 1792.

At issue in *Indiana v. Kentucky* was ownership of an island

which at the time of litigation was located north of the low-water mark on the north shore of the Ohio river. The Court examined in great detail the legislative actions which ultimately led to the creation of the Commonwealth of Kentucky and the State of Indiana, as well as its own earlier decision in *Handly's Lessee v. Anthony* and the decisions following that case. The Court concluded from this authority that:

"If when Kentucky became a State on the 1st of June, 1792, the waters of the Ohio River ran between that tract, known as Green River Island, and the main body of the State of Indiana, her [Kentucky's] right to it follows from the fact that her jurisdiction extended at that time to low-water mark on the northwest side of the river. She succeeded to the ancient right and possession of Virginia, and they could not be affected by any subsequent change of the Ohio River \* \* \* Her domain and jurisdiction continue as they existed at the time she was admitted into the Union, unaffected by the action of the forces of nature upon the course of the river." 136 U.S. at 508.

Thus, the 1792 low-water mark was adopted as Kentucky's border to the north, and the Court concluded that Green River Island belonged to Kentucky since it was south of the 1792 low-water mark.

The latest case in this Court addressing the issue of Kentucky's Ohio river boundary is the recent decision in *Ohio v. Kentucky*, 444 U.S. 335, 100 S. Ct. 588, 62 L. Ed. 2d 530 (1980). In that case, Kentucky repudiated the stance it had taken in *Indiana v. Kentucky* and instead argued that the present low-water mark constituted its boundary along the Ohio. The practical reason for this turnabout is easily discerned.

Subsequent to the decision in *Indiana v. Kentucky* a series of dams were built along the Ohio which had the effect of raising the general level of the river — and necessarily the low-water mark — considerably. Thus, by arguing for the present low-water mark, Kentucky was arguing for a decision that her boundary should be advanced northward at the expense of

Ohio and, implicitly, the other two States bordering Kentucky along the Ohio river.

In the effort to sustain its argument that the Court in *Ohio v. Kentucky* should adopt the present low-water mark, Kentucky was necessarily forced to argue that the Court's decision in *Indiana v. Kentucky* was not applicable. Among the difficulties of this position was the fact that Ohio, like Indiana — and Illinois — was created from a part of the territory ceded by Virginia to the United States in 1784. Thus, the Court's reasoning in *Indiana v. Kentucky* was equally compelling in *Ohio v. Kentucky*, as the Court duly noted:

"The fact that *Indiana v. Kentucky* concerned a portion of the Ohio River in its Indiana-Kentucky segment rather than a portion in its Ohio-Kentucky segment, is of no possible legal consequence; the applicable principles are the same, and the holding in *Indiana v. Kentucky* has pertinent application and is controlling precedent here." 444 U.S. at 339.

All of the factors relied upon by this Court in both *Indiana v. Kentucky* and *Ohio v. Kentucky* are equally compelling here. To paraphrase the Court's language in the latter decision, the fact that the present dispute concerns a portion of the Ohio river in its Illinois-Kentucky segment, rather than a portion in its Ohio-Kentucky or Indiana-Kentucky segment, is of no possible legal consequence. All three states bordering Kentucky on the Ohio were created from territory forming part of the Cession of Virginia, and the Court's conclusion as to the boundary of one of the three with Kentucky is controlling precedent as to the others.

Therefore, Plaintiff, State of Illinois, respectfully submits that its boundary with Kentucky is the low-water mark on the northerly shore of the Ohio river as it existed in 1792.

**CONCLUSION**

This Court has original and exclusive jurisdiction of this boundary dispute between the State of Illinois and the Commonwealth of Kentucky. The dispute should be resolved by finding the boundary between the parties to be the low-water mark on the northerly shore of the Ohio river as it existed in 1792.

Respectfully submitted,

/s/ Robert V. Shuff  
First Assistant Attorney General  
500 South Second Street  
Springfield, Illinois 62706  
217-782-1090  
Counsel of Record

July 21, 1986

## APPENDIX

LAWS OF VIRGINIA,  
CHAP. XVIII.

*An act to authorize the delegates of this state in congress, to convey to the United States, in congress assembled, all the right of this commonwealth to the territory north westward of the river Ohio.*

I. WHEREAS the congress of the United States did, by their act of the sixth day of September, in the year one thousand seven hundred and eighty, recommend to the several states in the union, having claims to waste and unappropriated lands in the western country, a liberal cession to the United States of a portion of their respective claims for the common benefit of the union.

II. And whereas this commonwealth did, on the second day of January, in the year one thousand seven hundred and eighty one, yield to the congress of the United States, for the benefit of the said states, all right, title, and claim, which the said commonwealth had to the territory north-west of the river Ohio, subject to the conditions annexed to the said act of cession.

III. And whereas the United States in congress assembled, have by their act of the thirteenth of September last, stipulated the terms on which they agree to accept the cession of this state, should the legislature approve thereof, which terms, although they do not come fully up to the propositions of this commonwealth, are conceived on the whole, to approach so nearly to them, as to induce this state to accept thereof, in full confidence that congress will, in justice to this state for the liberal cession she hath made, earnestly press upon the other states claiming large tracts of waste and uncultivated territory, the propriety of making cessions equally liberal for the common benefit and support of the union: *Be it enacted by the General Assembly,* That it shall and may be lawful for the delegates of this state to the Congress of the United States, or such of them as shall be

assembled in congress, and the said delegates, or such of them so assembled, are hereby fully authorized and empowered, for and on behalf of this state, by proper deeds or instrument in writing, under their hands and seals, to convey, transfer, assign, and make over unto the United States in congress assembled, for the benefit of the said states, all right, title, and claim, as well of soil as jurisdiction, which this commonwealth hath to the territory or tract of country within the limits of the Virginia charter, situate, lying, and being to the north-west of the river Ohio, subject to the terms and conditions contained in the before recited act of congress of the thirteenth day of September last, that is to say: Upon condition that the territory so ceded shall be laid out and formed into states, containing a suitable extent of territory, not less than one hundred, nor more than one hundred and fifty miles square, or as near thereto as circumstances will admit; and that the states so formed, shall be distinct republican states, and admitted members of the federal union, having the same rights of sovereignty, freedom, and independence, as the other states; that the necessary and reasonable expences incurred by this state in subduing any British posts, or in maintaining forts or garrisons within and for the defence, or in acquiring any part of the territory so ceded or relinquished, shall be fully reimbursed by the United States; and that one commissioner shall be appointed by congress, one by this commonwealth, and another by those two commissioners, who, or a majority of them, shall be authorized and empowered to adjust and liquidate the account of the necessary and reasonable expences incurred by this state, which they shall judge to be comprized within the intent and meaning of the act of congress of the tenth of October, one thousand seven hundred and eighty, respecting such expences. That the French and Canadian inhabitants, and other settlers of the Kaskaskies, St. Vincents, and the neighbouring villages, who have professed themselves citizens of Virginia, shall have their possessions and titles confirmed to them, and be protected in the enjoyment of their rights and liberties. That a quantity not



exceeding one hundred and fifty thousand acres of land, promised by this state, shall be allowed and granted to the then colonel, now general George Rogers Clarke, and to the officers and soldiers of his regiment, who marched with him when the posts of Kaskaskies and St. Vincents were reduced, and to the officers and soldiers that have been since incorporated into the said regiment; to be laid off in one tract, the length of which not to exceed double the breadth, in such place on the north-west side of the Ohio as a majority of the officers shall choose, and to be afterwards divided among the said officers and soldiers in due proportion, according to the laws of Virginia. That in case the quantity of good lands on the south-east side of the Ohio, upon the waters of Cumberland river, and between the Green river and Tenisee river, which have been reserved by law for the Virginia troops upon continental establishment, should, from the North Carolina line bearing in further upon the Cumberland lands than was expected, prove insufficient for their legal bounties, the deficiency should be made up to the said troops in good lands to be laid off between the rivers Scioto and Little Miami, on the north-west side of the river Ohio, in such proportions as have been engaged to them by the laws of Virginia. That all the lands within the territory so ceded to the United States, and not reserved for or appropriated to any of the before mentioned purposes, or disposed of in bounties to the officers and soldiers of the American army, shall be considered as a common fund for the use and benefit of such of the United States as have become, or shall become members of the confederation or federal alliance of the said states, Virginia inclusive, according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and *bona fide* disposed of for that purpose, and for no other use or purpose whatsoever. *Provided*, that the trust hereby reposed in the delegates of this state shall not be executed unless three of them, at least, are present in congress.



*Letter from delegates in Congress.*

ANNAPOLIS, MARCH 22, 1784.

Sir,

We inclose to your Excellency by the bearer, Mr. McAlister an exemplification of the deed of cession executed according to the directions of the act of assembly transmitted us, and have the honour to be with very high respect,

Your Excellency's

Most obedient and most humble servants.

TH. JEFFERSON,  
S. HARDY,  
JOHN FR. MERCER,  
ARTHUR LEE,  
JAMES MONROE,

His excellency governor Harrison.

*Exemplification of the deed of cession.*

TO ALL TO WHOM, these presents shall come;

KNOW YE, that among the archives of the United States in congress assembled, is lodged a deed or instrument in the words following:

TO ALL WHO SHALL SEE THESE PRESENTS,

We, Thomas Jefferson, Samuel Hardy, Arthur Lee, and James Monroe, the underwritten delegates for the commonwealth of Virginia, in the congress of the United States of America, send greeting:

WHEREAS, the general assembly of the commonwealth of Virginia, at their sessions begun on the twentieth day of October, one thousand seven hundred and eighty-three, passed an act, entitled "An act to authorize the delegates of this state in congress, to convey to the United States in congress assembled,

all the right of this commonwealth to the territory northward of the river Ohio," in these words following, to wit:

"WHEREAS the congress of the United States did, by their act of the sixth day of September, in the year one thousand seven hundred and eighty recommend to the several states in the Union, having claims to waste and unappropriated lands in the western country, a liberal cession to the United States, of a portion of their respective claims, for the common benefit of the union: and whereas this commonwealth did, on the second day of January, in the year one thousand seven hundred and eighty one, yield to the congress of the United States, for the benefit of the said states, all right, title and claim, which the said commonwealth had to the territory northwest of the river Ohio, subject to the conditions annexed to the said act of cession. AND WHEREAS the United States in congress assembled have, by their act of the thirteenth of September last, stipulated the terms on which they agree to accept the cession of this state should the legislature approve thereof which terms, although they do not come fully up to the propositions of this commonwealth, are conceived, on the whole, to approach so nearly to them, as to induce this state to accept thereof, in full confidence, that congress will, in justice to this state, for the liberal cession she hath made, earnestly press upon the other states claiming large tracts of waste and uncultivated territory, the propriety of making cessions equally liberal, for the common benefit and support of the union. *Be it enacted by the General Assembly*, That it shall and may be lawful for the delegates of this state to the congress of the United States, or such of them as shall be assembled in congress, and the said delegates, or such of them, so assembled, are hereby fully authorized and empowered, for and on behalf of this state, by proper deeds or instrument in writing, under their hands and seals, to convey, transfer, assign, and make over, unto the United States in congress assembled, for the benefit of the said states, all right, title, and claim, as well of soil as jurisdiction, which this com-

monwealth hath to the territory or tract of country within the limits of the Virginia charter, situate, lying, and being, to the northwest of the river Ohio, subject to the terms and conditions contained in the before recited act of congress of the thirteenth day of September last; that is to say, upon condition that the territory so ceded shall be laid out and formed into states, containing a suitable extent of territory, not less than one hundred, nor more than one hundred and fifty miles square, or as near thereto as circumstances will admit: and that the states so formed shall be distinct republican states, and admitted members of the federal union; having the same rights of sovereignty, freedom, and independence, as the other states. That the necessary and reasonableness expenses incurred by this state, in subduing any British posts, or in maintaining forts or garrisons within, and for the defence, or in acquiring any part of, the territory so ceded or relinquished, shall be fully reimbursed by the United States: and that one commissioner shall be appointed by congress, one by this commonwealth, and another by those two commissioners, who, or a majority of them, shall be authorized and empowered to adjust and liquidate the account of the necessary and reasonable expenses incurred by this state, which they shall judge to be comprised within the intent and meaning of the act of congress, of the tenth of October, one thousand seven hundred and eighty, respecting such expenses. That the French and Canadian inhabitants, and other settlers of the Kaskaskies, St. Vincents, and the neighbouring villages, who have professed themselves citizens of Virginia, shall have their possessions and titles confirmed to them, and be protected in the enjoyment of their rights and liberties. That a quantity not exceeding one hundred and fifty thousand acres of land, promised by this state, shall be allowed and granted to the then colonel, now general George Rogers Clarke, and to the officers and soldiers of his regiment, who marched with him when the post of Kaskaskies and St. Vincents were reduced, and to the officers and soldiers that

have been since incorporated into the said regiment, to be laid off in one tract, the length of which not to exceed double the breadth, in such place, on the northwest side of the Ohio, as a majority of the officers shall choose, and to be afterwards divided among the said officers and soldiers in due proportion, according to the laws of Virginia. That in case the quantity of good land on the southeast side of the Ohio, upon the waters of Cumberland river, and between the Green river and Tennessee river, which have been reserved by law for the Virginia troops, upon continental establishment, should, from the North Carolina line bearing in further upon the Cumberland lands than was expected, prove insufficient for their legal bounties, the deficiency should be made up to the said troops, in good lands, to be laid off between the rivers Scioto and Little Miami, on the northwest side of the river Ohio, in such proportions as have been engaged to them by the laws of Virginia. That all the lands within the territory so ceded to the United States, and not reserved for, or appropriated to, any of the before-mentioned purposes, or disposed of in bounties to the officers and soldiers of the American army, shall be considered as a common fund for the use and benefit of such of the United States as have become, or shall become members of the confederation or federal alliance of the said states, Virginia inclusive, according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and bona fide disposed of for that purpose, and for no other use or purpose whatsoever. Provided, that the trust hereby reposed in the delegates of this state, shall not be executed unless three of them at least are present in congress.

AND WHEREAS, the said general assembly, by their resolution of June sixth, one thousand seven hundred and eighty-three, had constituted and appointed us, the said Thomas Jefferson, Samuel Hardy, Arthur Lee, and James Monroe, delegates to represent the said commonwealth in congress for one year, from the first Monday in November then next following, which

resolution remains in full force: NOW, THEREFORE, KNOW YE, that we, the said Thomas Jefferson, Samuel Hardy, Arthur Lee, and James Monroe, by virtue of power and authority committed to us by the act of the said general assembly of Virginia, before recited, and in the name, and for and on behalf, of the said commonwealth, do, by these presents, convey, transfer, assign, and make over, unto the United States, in congress assembled, for the benefit of said states, Virginia inclusive, all right, title and claim, as well of soil as of jurisdiction, which the said commonwealth hath to the territory or tract of country within the limits of the Virginia charter, situate, lying, and being, to the northwest of the river Ohio, to and for the uses and purposes and on the conditions of the said recited act. In testimony whereof, we have hereunto subscribed our names and affixed our seals, in congress, the first day of March, in the year of our Lord one thousand seven hundred and eighty-four, and of the independence of the United States the eighth.

TH. JEFFERSON, (L.S.)  
 S. HARDY, (L.S.)  
 ARTHUR LEE, (L.S.)  
 JAMES MONORE, (L.S.)

Signed, sealed, and delivered in presence of

CHA. THOMPSON,  
 HENRY REMSEN, Junr.  
 BEN. BANKSON, Junr.

IN TESTIMONY WHEREOF, the United States have caused their Great Seal to be affixed to this exemplification. WITNESS, Charles Thompson, esquire, their secretary and keeper of their Great Seal.

CHA. THOMPSON.

[From the original, in the clerk's office of the house of delegates, among the governor's communication of 1784.]



## ENABLING ACT

ACT OF CONGRESS, APRIL 18, 1818

3 U.S. St. at Large, 428

An Act to enable the people of the Illinois territory to form a constitution and state government, and for the admission of such state into the Union on an equal footing with the original states.

§ 1. *Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,* That the inhabitants of the territory of Illinois be, and they are hereby, authorized to form for themselves a constitution and state government, and to assume such name as they shall deem proper; and the said state, when formed, shall be admitted into the union upon the same footing with the original states, in all respects whatever.

§ 2. *And be it further enacted,* That the said state shall consist of all the territory included within the following boundaries, to wit; Beginning at the mouth of the Wabash river; thence, up the same, and with the line of Indiana, to the north-west corner of said state; thence, east with the line of the same state, to the middle of Lake Michigan; thence, north along the middle of said lake, to north latitude forty-two degrees thirty minutes; thence, west to the middle of the Mississippi river; and thence, down along the middle of that river, to its confluence with the Ohio river; and thence, up the latter river, along its north-western shore, to the beginning: *Provided*, That the convention hereinafter provided for, when formed, shall ratify the boundaries aforesaid; otherwise they shall be and remain as now prescribed by the ordinance for the government of the territory north-west of the river Ohio: *Provided also*, That the said state shall have concurrent jurisdiction with the state of Indiana on the Wabash river, so far as said river shall form a common boundary to both, and also concurrent jurisdiction on the Mississippi river, with any state or states to be formed west



thereof, so far as said river shall form a common boundary to both.

§ 3. *And be it further enacted*, That all white male citizens of the United States, who shall have arrived at the age of twenty-one years, and have resided in said territory six months previous to the day of election, and all persons having in other respects the legal qualifications to vote for representatives in the general assembly of the said territory, be, and they are hereby, authorized to choose representatives to form a convention, who shall be apportioned amongst the several counties as follows:

From the county of Bond, two representatives:

From the county of Madison, three representatives:

From the county of St. Clair, three representatives:

From the county of Monroe, two representatives:

From the county of Randolph, two representatives:

From the county of Jackson, two representatives:

From the county of Johnson, two representatives:

From the county of Pope, two representatives:

From the county of Gallatin, three representatives:

From the county of White, two representatives:

From the county of Edwards, two representatives:

From the county of Crawford, two representatives:

From the county of Union, two representatives:

From the county of Washington, two representatives:

From the county of Franklin, two representatives:

And the election for the representatives aforesaid shall be holden on the first Monday of July next, and the two following

days, throughout the several counties in the said territory, and shall be conducted in the same manner, and under the same regulations, as prescribed by the laws of the said territory regulating elections therein, for members of the House of Representatives.

§ 4. *And be it further enacted*, That the members of the convention, thus duly elected, be, and they are hereby, authorized to meet at the seat of government of the said territory, on the first Monday of the month of August next, which convention, when met, shall first determine, by a majority of the whole number elected, whether it be, or be not, expedient at that time to form a constitution and state government for the people within the said territory, and, if it be expedient, the convention shall be and hereby is authorized to form a constitution and state government; or, if it be deemed more expedient, the said convention shall provide by ordinance for electing representatives to form a constitution or frame of government; which said representatives shall be chosen in such manner, and in such proportion, and shall meet at such time and place, as shall be prescribed by the said ordinance, and shall then form for the people of said territory a constitution and state government: *Provided*, That the same, whenever formed, shall be republican, and not repugnant to the ordinance of the thirteenth of July, seventeen hundred and eighty-seven, between the original states and the people and states of the territory northwest of the river Ohio; excepting so much of said articles as relate to the boundaries of the states therein to be formed: *And provided also*, That it shall appear, from the enumeration directed to be made by the legislature of the said territory, that there are, within the proposed state, not less than forty thousand inhabitants.

§ 5. *And be it further enacted*, That until the next general census shall be taken, the said state shall be entitled to one representative in the House of Representatives of the United States.

§ 6. *And be it further enacted*, That the following propositions be and the same are hereby, offered to the convention of the said territory of Illinois, when formed, for their free acceptance or rejection, which if accepted by the convention, shall be obligatory upon the United States and the said state.

*First.* That section numbered sixteen, in every township, and, when such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to the state, for the use of the inhabitants of such township, for the use of schools.

*Second.* That all salt springs within such state, and the land reserved for the use of the same, shall be granted to the said state, for the use of the said state, and the same to be used under such terms, and conditions, and regulations, as the legislature of the said state shall direct: *Provided*, The legislature shall never sell nor lease the same for a longer period than ten years, at any one time.

*Third.* That five per cent of the net proceeds of the lands lying within such state, and which shall be sold by Congress, from and after the first day of January, one thousand eight hundred and nineteen, after deducting all expenses incident to the same, shall be reserved for the purposes following, viz.: two-fifths to be disbursed, under the direction of Congress, in making roads leading to the state; the residue to be appropriated, by the legislature of the state, for the encouragement of learning, of which one-sixth part shall be exclusively bestowed on a college or university.

*Fourth.* That thirty-six sections, or one entire township, which shall be designated by the President of the United States, together with the one heretofore received for that purpose, shall be reserved for the use of a seminary of learning, and vested in the legislature of the said state, to be appropriated solely to the use of such seminary by the said legislature. *Provided always*, That the four foregoing propositions, herein

offered, are on the conditions that the convention of the said state shall provide, by an ordinance irrevocable without the consent of the United States, that every and each tract of land sold by the United States, from and after the first day of January, one thousand eight hundred and nineteen, shall remain exempt from any tax laid by order, or under any authority of, the state, whether for state, county, or township, or any other purpose whatever, for the term of five years from and after the day of sale: *And further*, That the bounty lands granted, or hereafter to be granted, for military services during the late war, shall, while they continue to be held by the patentees, or their heirs, remain exempt, as aforesaid, from all taxes, for the term of three years, from and after the date of the patents respectively; and that all the lands belonging to the citizens of the United States, residing without the said state, shall never be taxed higher than lands belonging to persons residing therein.

§ 7. *And be it further enacted*, That all that part of the territory of the United States lying north of the state of Indiana, and which was included in the former Indiana territory, together with that part of the Illinois territory which is situated north of and not included within the boundaries prescribed by this act, to the state thereby authorized to be formed, shall be, and hereby is, attached to, and made a part of the Michigan territory, from and after the formation of the said state, subject, nevertheless, to be hereafter disposed of by Congress, according to the right reserved in the fifth article of the ordinance aforesaid, and the inhabitants therein shall be entitled to the same privileges and immunities, and subject to the same rules and regulations, in all respects, with the other citizens of the Michigan territory.

## CHAP. XIV.

*An act concerning the erection of the district of Kentuckey into an independent state.*

(Passed the 18th of December, 1789.)

SECT. 1. WHEREAS it is represented to this present General Assembly, that the act of last session intituled "An act concerning the erection of the district of Kentuckey into an independent state," which contains terms materially different from those of the act of October session, one thousand seven hundred and eighty-five, are found incompatible with the real views of this Commonwealth, as well as injurious to the good people of the said district:

*Be it enacted by the General Assembly,* That in the month of May next, on the respective court days of the counties within the said district, and at the respective places of holding courts therein, representatives to continue in appointment for one year, and to compose a convention with the powers, and for the purposes herein after mentioned, shall be elected by the free male inhabitants of each county above the age of twenty-one years, in like manner as delegates to the General Assembly have been elected within said district in the proportions following: In the county of Jefferson shall be elected five representatives; in the county of Nelson five representatives; in the county of Mercer five representatives; in the county of Lincoln five representatives; in the county of Madison five representatives; in the county of Fayette five representatives; in the county of Woodford five representatives; in the county of Bourbon five representatives, and in the County of Mason five representatives: *Provided*, that no free male inhabitant above the age of twenty-one years, shall vote in any other county except that in which he resides, and that no person shall be capable of being elected unless he has been a resident within the said district at least one year.



SECT. 2. That full opportunity may be given to the good people of exercising their right of suffrage on an occasion so interesting to them, each of the officers holding such elections, shall continue the same from day to day, passing over Sunday, for five days, including the first day, and shall cause this act to be read on each day immediately preceding the opening of the election, at the door of the court-house or other convenient place; each of the said officers shall deliver to each person duly elected a representative, a certificate of his election, and shall transmit a general return to the clerk of the supreme court, to be by him laid before the convention.

SECT. 3. For every neglect of any of the duties hereby enjoined on such officer, he shall forfeit one hundred pounds, to be recovered by action of debt by any person suing for the same.

SECT. 4. The said convention shall be held at Danville on the twenty-sixth day of July next, and shall and may proceed, after choosing a president and other proper officers, and settling the proper rules of proceeding, to consider and determine whether it be expedient for, and the will of the good people of the said district that the same be erected into an independent state, on the terms and conditions following:

SECT. 5. First, that the boundary between the proposed state and Virginia, shall remain the same as at present separates the district from the residue of this Commonwealth.

SECT. 6. Second, that the proposed state shall take upon itself a just proportion of the debt of the United States, and the payment of all the certificates granted on account of the several expeditions carried on from the Kentuckey district against the Indians, since the first day of January one thousand seven hundred and eighty-five.

SECT. 7. Third, that all private rights and interests of lands within the said district, derived from the laws of Virginia prior



to such separation, shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in this state.

SECT. 8. Fourth, that the lands within the proposed state of non resident proprietors, shall not in any case be taxed higher than the lands of residents, at any time prior to the admission of the proposed state to a vote by its delegates in Congress, where such non residents reside out of the United States; nor at any time either before or after such admission, where such non residents reside within this Commonwealth, within which this stipulation shall be reciprocal; or where such non residents reside within any other of the United States, which shall declare the same to be reciprocal within its limits; nor shall a neglect of cultivation or improvement of any land within either the proposed state or this Commonwealth, belonging to non residents, citizens of the other, subject such non residents to forfeiture or other penalty within the term of six years, after the admission of the said state into the Federal Union.

SECT. 9. Fifth, that no grant of land or land warrant to be issued by the proposed state, shall interfere with any warrant heretofore issued from the land office of Virginia, which shall be located on land within said district now liable thereto, on or before the first day of September one thousand seven hundred and ninety-one.

SECT. 10. Sixth, that the unlocated lands within the said district, which stand appropriated to individuals or description of individuals, by the laws of this Commonwealth, for military or other services, shall be exempt from the disposition of the proposed state, and shall remain subject to the disposed of by the Commonwealth of Virginia, according to such appropriation, until the first day of May one thousand seven hundred and ninety-two, and no longer: thereafter the residue of all lands remaining within the limits of said district, shall be subject to the disposition of the proposed state.

SECT. 11. Seventh, that the use and navigation of the river Ohio, so far as the territory of the proposed state, or the territory which shall remain within the limits of this Commonwealth lies thereon, shall be free and common to the citizens of the United States, and the respective jurisdictions of this Commonwealth and of the proposed state on the river as aforesaid, shall be concurrent only with the states which may possess the opposite shores of the said river.

SECT. 12. Eighth, that in case any complaint or dispute shall at any time arise between the Commonwealth of Virginia and the said district, after it shall be an independent state, concerning the meaning or execution of the foregoing articles, the same shall be determined by six commissioners, of whom two shall be chosen by each of the parties, and the remainder by the commissioners so first appointed.

SECT. 13. *Provided however*, That five members assembled, shall be a sufficient number to adjourn from day to day, and to issue writs for supplying vacancies which may happen from deaths, resignations or refusals to act; a majority of the whole shall be a sufficient number to chuse a president, settle the proper rules of proceeding, authorise any number to summon a convention during a recess, and to act in all other instances where a greater number is not expressly required. Two thirds of the whole shall be a sufficient number to determine on the expediency of forming the said district into an independent state on the aforesaid terms and conditions, *Provided* that a majority of the whole number to be elected concur therein.

SECT. 14. *And be it further enacted*, That if the said convention shall approve of the erection of the said district into an independent state on the foregoing terms and conditions, they shall and may proceed to fix a day posterior to the first day of November, one thousand seven hundred and ninety-one, on which the authority of this Commonwealth, and of its laws under the exceptions aforesaid, shall cease and determine

forever over the proposed state, and the said articles become a solemn compact mutually binding on the parties, and unalterable by either without the consent of the other.

SECT. 15. *Provided however,* That prior to the first day of November, one thousand seven hundred and ninety-one, the general government of the United States shall assent to the erection of the said district into an independent state, shall release this Commonwealth from all its federal obligations arising from the said district as being part thereof, and shall agree that the proposed state shall immediately after the day to be fixed as aforesaid posterior to the first day of November one thousand seven hundred and ninety-one, or at some convenient time future thereto, be admitted into the Federal Union.

SECT. 16. And to the end that no period of anarchy may happen to the good people of the proposed state, it is to be understood that the said convention shall have authority to take the necessary provisional measures for the election and meeting of a convention, at some time prior to the day fixed for the determination of the authority of this Commonwealth, and of its laws over said district, and posterior to the first day of November one thousand seven hundred and ninety-one aforesaid, with full power and authority to frame and establish a fundamental constitution of government for the proposed state, and to declare what laws shall be in force therein, until the same shall be abrogated or altered by the legislative authority acting under the constitution so to be framed and established.

SECT. 17. *And be it further enacted,* That the electors in going to, continuing at, and returning from an election of members to the said convention, shall be entitled to the same privileges from arrest, as are by law allowed at an election of members to the General Assembly, and each person returned to serve as a member in said convention, shall be entitled to the same privileges from arrest in going to, during his attendance on, and returning from said convention, as are by law allowed to the members of the General Assembly.

SECT. 18. This act shall be transmitted by the executive to the representatives of this Commonwealth in Congress, who are hereby instructed to use their endeavours to obtain from Congress a speedy act to the effect above specified.

No. 100, Original

2

FILED

SEP 18 1986

JOSEPH E. SPANIOLO, JR.  
CLERK

IN THE  
**SUPREME COURT OF THE UNITED STATES**

October Term, 1986

**STATE OF ILLINOIS,** - - - - - **Plaintiff,**

**versus**

**COMMONWEALTH OF KENTUCKY,** - **Defendant.**

**DEFENDANT'S BRIEF IN RESPONSE TO  
PLAINTIFF'S MOTION FOR LEAVE  
TO FILE COMPLAINT**

**DAVID L. ARMSTRONG**  
*Attorney General*  
*Commonwealth of Kentucky*

**KEVIN M. NOLAND**  
*General Counsel*  
121 State Capitol  
Frankfort, Kentucky 40601-3494  
(502) 564-7600  
*Counsel of Record*

**NATHAN GOLDMAN**  
*Assistant Attorney General*  
*Counsel for Commonwealth of Kentucky*

5 pp



IN THE  
**SUPREME COURT OF THE UNITED STATES**

October Term, 1986

No. 106, Original

---

STATE OF ILLINOIS,       -   -   -   -   -   *Plaintiff,*

*v.*

COMMONWEALTH OF KENTUCKY,   -   -   *Defendant.*

---

**DEFENDANT'S BRIEF IN RESPONSE TO  
PLAINTIFF'S MOTION FOR LEAVE  
TO FILE COMPLAINT**

---

The Commonwealth of Kentucky, by its Attorney General, David L. Armstrong, responds herein to the State of Illinois' motion for leave to file complaint.

The Commonwealth does not disagree with the Plaintiff's assertion that Article III, Section 2, Clause 2 of the United States Constitution and 28 U.S.C. § 1251(a) confer jurisdiction on this Court concerning this matter.

This case involves the question of the boundary between Illinois and Kentucky along the Ohio River. Kentucky was created from the District of Kentucky, a portion of Virginia, in 1789 by the Virginia-Kentucky Compact passed by the Virginia legislature. Kentucky was subsequently admitted to the Union in 1792. Kentucky, following its creation, succeeded to all the rights in and claims to the Ohio River that



Virginia had previously held. In *Handly's Lessee v. Anthony*, 18 U. S. 374, 5 L. Ed. 113 (1820) Chief Justice Marshall held that the Ohio River, in its entirety, was within the boundaries of the Commonwealth of Kentucky. He stated:

"When a great river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one State is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly-created State extends to the river only. The river, however, is its boundary." 18 U. S. at 379.

Illinois was created in 1818 from part of the territory ceded by Virginia to the United States in 1783 in the Deed of Cession. This Deed of Cession involved all the territory Virginia claimed northwest of the Ohio River. XI Hening's Va. St. at Large, 571.

As is indicated clearly from the history of the two states, the Ohio River in its entirety was to belong to Kentucky and be Kentucky's boundary with Illinois. Consistently from the date of its creation almost 200 years ago to the present, Kentucky has claimed the entire Ohio River as its territory. It has always been Kentucky's contention that the boundary between Illinois and Kentucky is the low-water mark on the northwest side of the Ohio River as it exists from time to time.

Since its creation in 1818, Illinois has acquiesced in Kentucky's claim and the Commonwealth will so

allege in its Answer to Illinois' Complaint, if leave for the filing of the Complaint is granted by the Court. In the course of this lawsuit the Commonwealth will offer proof of Illinois' acquiescence. Additionally, the Commonwealth will distinguish, both factually and legally, this case from *Ohio v. Kentucky*, 444 U. S. 335, 100 S. Ct. 588, 62 L. Ed. 2d 530 (1980).

Respectfully submitted,

KEVIN M. NOLAND

*General Counsel*

121 State Capitol

Frankfort, Kentucky 40601-3494

(502) 564-7600

*Counsel of Record*

**CERTIFICATE OF SERVICE**

I, Kevin M. Noland, Counsel of Record for defendant and a member in good standing of the Bar of the Supreme Court of the United States, hereby certify that on the \_\_\_\_ day of September, 1986, I served the foregoing brief on the plaintiff by depositing in the U. S. Mail, first class, postage prepaid, a copy addressed to the following counsel for the plaintiff: Attorney General Neil F. Hartigan; Robert V. Shuff, First Assistant Attorney General; Roma J. Stewart, Solicitor General, State of Illinois, and Donna Dagnall and John Brunsman, Assistant Attorneys General, at 500 South Second Street, Springfield, Illinois 62706.

**KEVIN M. NOLAND**  
*General Counsel*  
*Office of the Attorney General*  
121 State Capitol  
Frankfort, Kentucky 40601-3494  
(502) 564-7600  
*Counsel for Defendant*

DEC 15 1986

JOSEPH F. SPANIOLO, JR.  
CLERK

No. 106 ORIGINAL

IN THE

## SUPREME COURT OF THE UNITED STATES

October Term, 1986

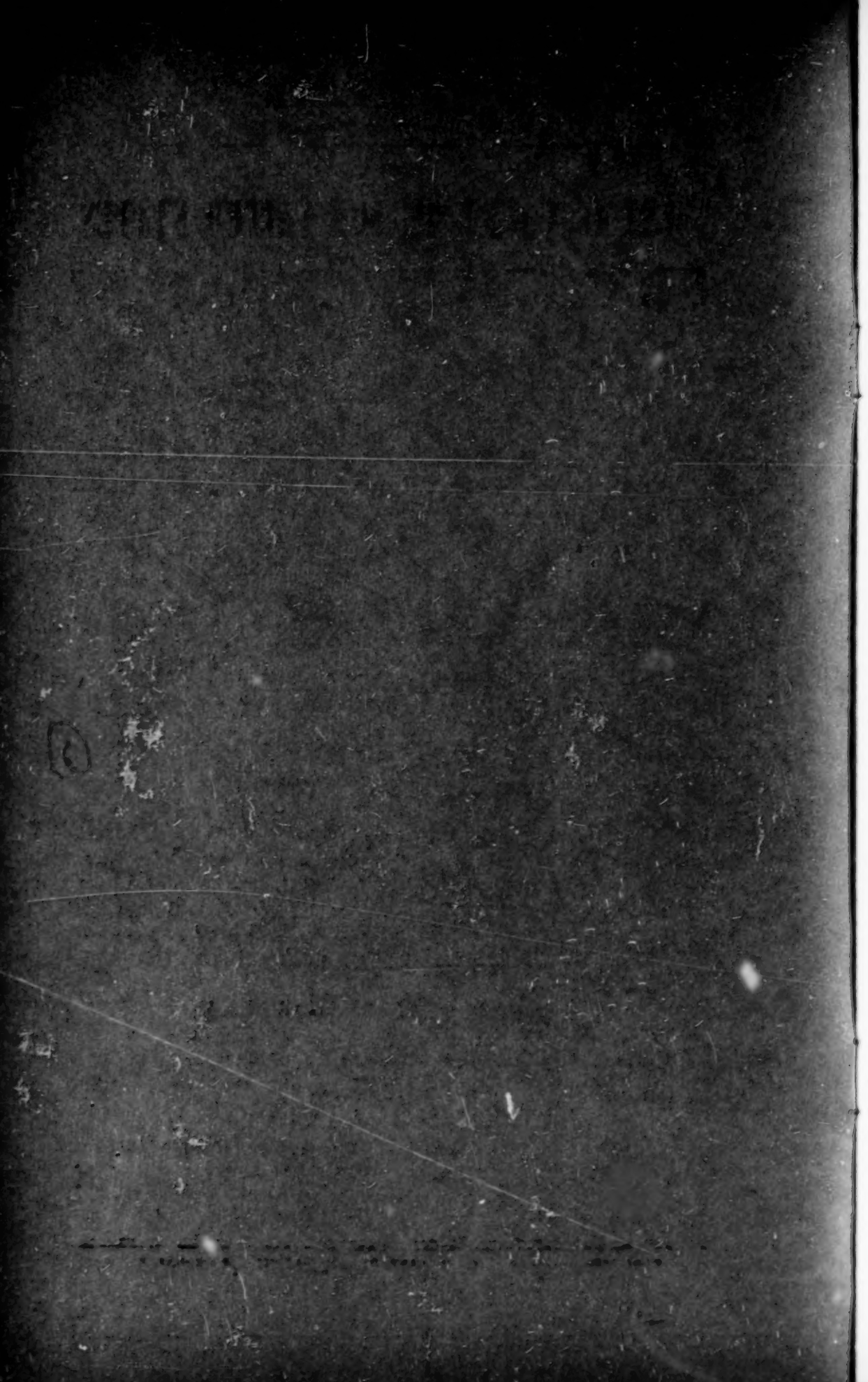
STATE OF ILLINOIS - - - - - Plaintiff

VERSUS

COMMONWEALTH OF KENTUCKY - - Defendant

## ANSWER

DAVID L. ARMSTRONG  
*Attorney General*KEVIN M. NOLAND  
*General Counsel*NATHAN GOLDMAN  
*Assistant Attorney General*  
State Capitol  
Room 122  
Frankfort, Kentucky 40601  
*Attorneys for Defendant*  
*Commonwealth of Kentucky*



No. 106 ORIGINAL  
IN THE  
**SUPREME COURT OF THE UNITED STATES**

October Term, 1986

---

STATE OF ILLINOIS       -   -   -   -   -   *Plaintiff*

*v.*

COMMONWEALTH OF KENTUCKY       -   -   *Defendant*

---

**ANSWER**

---

**FIRST DEFENSE**

Comes the Defendant, Commonwealth of Kentucky, by counsel, and in Answer to Plaintiff's Complaint, states as follows:

1. Defendant admits the material allegations of paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, XV, and XVI.

2. Defendant denies the material allegations of paragraphs XI, XII, XIII, XIV, XVII, and XVIII,

**SECOND DEFENSE**

Comes the Defendant, by counsel, and for its second defense, alleges as follows:

1. As is clearly indicated from the history of the two states, the Ohio River in its entirety was to belong to Kentucky and be Kentucky's boundary with Illinois.



Consistently from the date of its creation almost 200 years ago to the present, Kentucky has claimed the entire Ohio River as its territory. It has always been Kentucky's contention that the boundary between Illinois and Kentucky is the low-water mark on the northwest side of the Ohio River as it exists from time to time.

2. Since its creation in 1818, Illinois has acquiesced in this determination and has failed to bring any proceedings or to otherwise dispute Kentucky's claim. For example, Illinois failed to join in the case of *Ohio v. Kentucky*, [No. 27, Original; decided 471 U. S. —, 85 L. Ed. 2d 119, 105 S. Ct. 2011 (1985)] or *Kentucky v. Indiana*, [No. 81, Original].

### THIRD DEFENSE

Comes the Defendant, by counsel, and for its third defense, alleges as follows:

1. That Illinois' failure to bring proceedings or to otherwise dispute Kentucky's claim constitutes laches, and therefore, Illinois' claim in this cause must be disallowed.

### FOURTH DEFENSE

Comes the Defendant, by counsel, and for its fourth defense, alleges as follows:

1. That the decisions of this Court in *Ohio v. Kentucky*, 444 U. S. 335 (1980) and *Ohio v. Kentucky*, 471 U. S. — (1985) do not apply to this case. Rather, the Court's decision in *Ohio v. Kentucky*, 410 U. S.

641 (1973) as it applies to the facts herein is controlling.

2. Consistently over the years, Illinois has refused to assert jurisdiction over any portion of the Ohio River and has acquiesced in Kentucky's assertion of jurisdiction over the Ohio River in its entirety. As a result, the acquiescence principal applied in *Ohio v. Kentucky*, 410 U. S. 641 (1973), is applicable to the present case to confirm that the boundary between Illinois and Kentucky is the low-water mark on the northwest side of the Ohio River as it exists from time to time.

### **FIFTH DEFENSE**

Comes the Defendant, by counsel, and for its fifth defense, alleges as follows:

1. That pursuant to the principles of riparian boundaries, including accretion, erosion and avulsion, the boundary between Illinois and Kentucky should be the low-water mark on the northwestern side of the Ohio River as it exists from time to time.

WHEREFORE, the Defendant, Commonwealth of Kentucky, urges Plaintiff take nothing by its Complaint; that the boundary line between Illinois and Kentucky be affirmed as the low-water mark on the northwest side of the Ohio River as it exists from time to time; that it be awarded its costs in defending this action; and for other just and proper relief.

Respectfully submitted,

DAVID L. ARMSTRONG  
*Attorney General*

KEVIN M. NOLAND  
*General Counsel*

NATHAN GOLDMAN  
*Assistant Attorney General*  
State Capitol  
Room 122  
Frankfort, Kentucky 40601  
*Attorneys for Defendant.*  
*Commonwealth of Kentucky*

**CERTIFICATE**

I, Kevin M. Noland, Counsel of Record for defendant and a member in good standing of the Bar of the Supreme Court of the United States, hereby certify that on the \_\_\_\_ day of December, 1986, I served the foregoing Answer on the plaintiff by depositing in the U.S. Mail, first class, postage prepaid, a copy addressed to the following counsel for the plaintiff: Attorney General Neil F. Hartigan; Robert V. Shuff, First Assistant Attorney General; Roma J. Stewart, Solicitor General, State of Illinois; and Donna Dagnall and John Brunsman, Assistant Attorneys General, at 500 South Second Street, Springfield, Illinois 62706.

KEVIN M. NOLAND  
*Counsel for Defendant*

**No. 106, Original**

Supreme Court, U.S.  
FILED  
JUL 5 1990  
JOSEPH F. SPANIO, JR.  
CLERK

IN THE  
**Supreme Court of the United States**

\_\_\_\_\_  
**October Term, 1986**  
\_\_\_\_\_

**STATE OF ILLINOIS,**

*Plaintiff,*

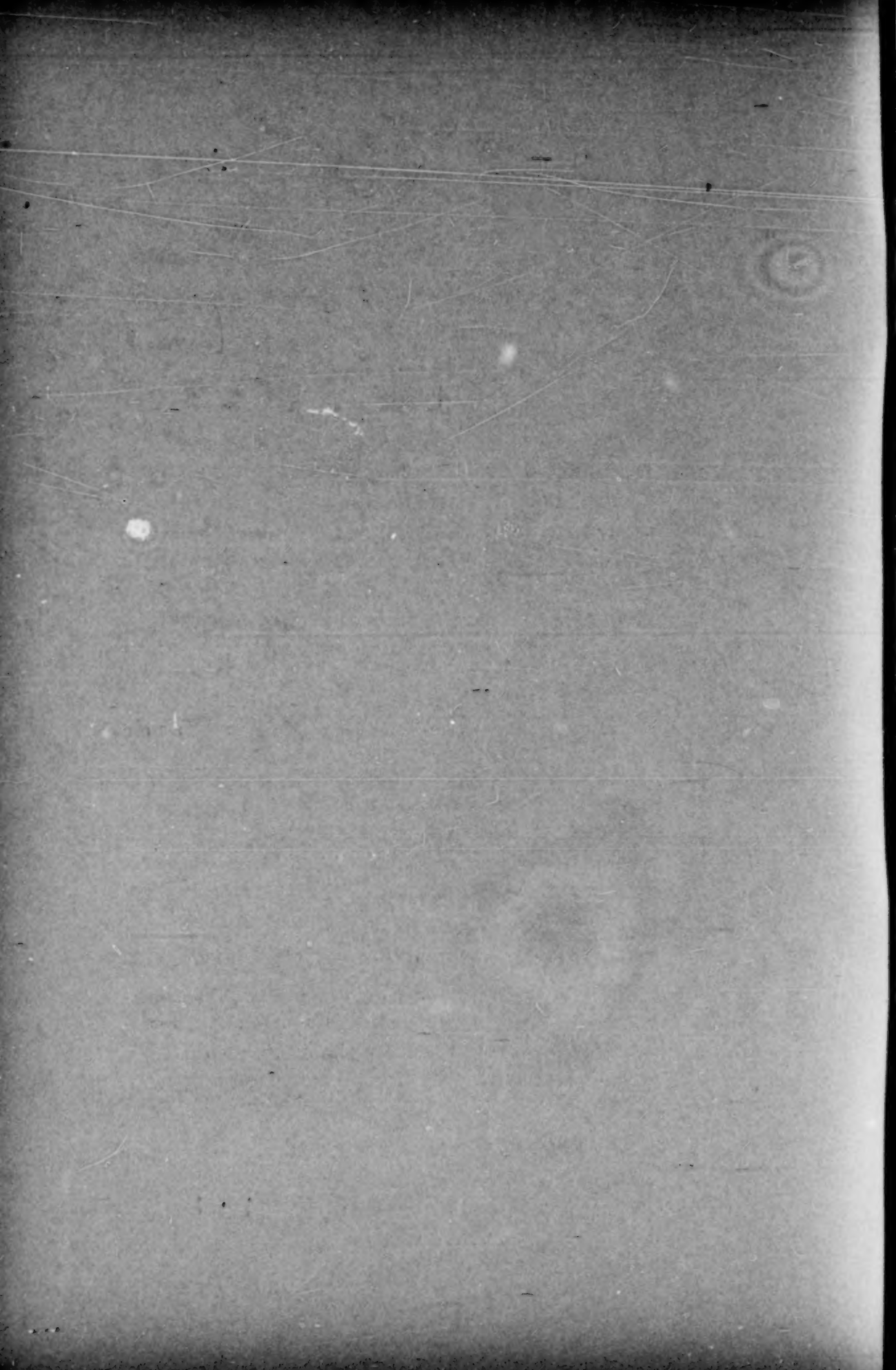
**v.**

**COMMONWEALTH OF KENTUCKY,**

*Defendant.*

\_\_\_\_\_  
**REPORT OF SPECIAL MASTER**  
\_\_\_\_\_

**MATTHEW J. JASEN**  
**2300 Empire Tower**  
**Buffalo, New York 14202**  
**Special Master**





## TABLE OF CONTENTS.

	Page
I. STATEMENT OF THE CASE .....	1
II. THE ISSUE PRESENTED .....	4
III. FACTUAL FINDINGS AND LEGAL ANALYSIS.....	5
A. Are prior decisions of this Court establishing the boundary between the Commonwealth of Kentucky and the states of Indiana and Ohio, to be the low-water mark on the northerly side of the Ohio River as it existed in the year 1792, controlling precedents on the question of Kentucky's boundary with Illinois?.....	6
B. Does the record support Kentucky's affirmative defenses of acquiescence, laches, accretion, erosion and avulsion to sustain Kentucky's claim that its Ohio River boundary with Illinois is the shore line on the Illinois side of the river, as it exists from time to time rather than the 1792 low-water mark? .....	11
C. Has the construction of dams on the Ohio River between Illinois and Kentucky permanently raised the level of the river above its level in 1792, and as a result, the present low-water mark on the Illinois side of the river is farther north than it was in 1792? .....	43
IV. RECOMMENDATIONS .....	48

# TABLE OF AUTHORITIES.

Cases:	Page
<i>Arkansas v. Tennessee</i> , 246 U.S. 158 [1919] . . . . .	19,20
<i>Bedford-Nugent Co. v. Herndon</i> , 196 Ky. 477 [1922].	18
<i>Berry v. Snyder</i> , 66 Ky. (8 Bush.) 266 [1867] . . . . .	18,19
<i>Church v. Chambers</i> , 33 Ky. (3 Dana) 274 [1835] . . . .	19
<i>City of Covington v. State Tax Com.</i> , 231 Ky. 606 [1929] . . . . .	18
<i>Commonwealth v. Henderson Co.</i> , 371 S.W. 2d. 27 [1963] . . . . .	18
<i>Commonwealth v. Louisville &amp; E. Packet Co.</i> , 117 Ky. 936 [1904] . . . . .	18
<i>Ensminger v. People</i> , 47 Ill. 384 [1868] . . . . .	31
<i>Fleming v. Kenny</i> , 27 Ky. (4 J.J. Marsh) 155 [1830] .	19
<i>Handly's Lessee v. Anthony</i> , 5 Wheat. 374 [1820] . 6,7,15	
<i>Henderson Bridge Co. v. Henderson City</i> , 173 U.S. 592 [1899] . . . . .	6,8
<i>Indiana v. Kentucky</i> , 136 U.S. 479 [1890] . . . . .	<i>passim</i>
<i>Iowa v. Illinois</i> , 147 U.S. [1893] . . . . .	19,20
<i>Joyce-Watkins Co. v. Industrial Com.</i> , 325 Ill. 378 [1927] . . . . .	31,32
<i>Louisville Bridge Co. v. City of Louisville</i> , 81 Ky. 189 [1833] . . . . .	18
<i>Louisville Sand / Gravel Co. v. Ralston</i> , 266 S.W. 2d 119 [1954] . . . . .	18
<i>Maxwell Land Grant Co. v. Damson</i> , 151 U.S. 586 . . . . .	11
<i>Meyler v. Wedding</i> , 107 Ky. 310 [1899]; rev'd on other grounds, 192 U.S. 573 [1899] . . . . .	18
<i>McFall v. Commonwealth of Kentucky</i> , 59 Ky. (2 Metc.) 394 [1859] . . . . .	18,19
<i>McFarland v. McKnight</i> , 45 Ky. (G.B. Mon.) 500 [1846] . . . . .	19

iii.

	Page
<i>Michigan v. Wisconsin</i> , 270 U.S. 295 .....	11
<i>Nebraska v. Iowa</i> , 143 U.S. 359 [1892]. ....	19,20
<i>Nicoulin v. O'Brien</i> , 172 Ky. 473, 189 [1916]. ....	18,30
<i>Nielsen v. Oregon</i> , 212 U.S. 315 [1909] .....	30
<i>Ohio v. Kentucky</i> , 410 U.S. 646 .....	15
<i>Ohio v. Kentucky</i> , 444 U.S. 335 [1980] .....	<i>passim</i>
<i>Oklahoma v. Texas</i> , 272 U.S. 21 .....	11
<i>People ex rel. Scott v. Dravo Corp.</i> , 10 Ill. App. 3rd 944 .....	32
<i>Perks v. McCracken</i> , 169 Ky. 590 [1916]. ....	17,18,22
<i>Rhode Island v. Massachusetts</i> , 37 U.S. (12 Pet.) 464 [1838]. ....	41
<i>Robertson v. Commonwealth</i> , 101 Ky. 285 [1987] ...	41
<i>Shannon v. Streckfus Steamers</i> , 279 Ky. 649 [1939] .	18
<i>Spaulding v. Simms</i> , 61 Ky. (4 Mete) 285 [1863] ...	18
<i>Union Bridge Co. v. Industrial Com.</i> , 287 Ill. 396 [1919]. ....	31
<i>United States v. Summerlin</i> , 310 U.S. 414 [1940] .....	41
<i>Ware v. Hager</i> , 126 Ky. 324 [1907] .....	18
<i>Wedding v. Meyler</i> , 192 U.S. 573 [1904] .....	30
<i>Willis v. Boyd</i> , 224 Ky. 732 [1928]. ....	18



IN THE  
**Supreme Court of the United States**

---

October Term, 1986

---

No. 106, Original

---

STATE OF ILLINOIS,

*Plaintiff,*

v.

COMMONWEALTH OF KENTUCKY,

*Defendant.*

---

**REPORT OF SPECIAL MASTER**

---

**I.**

**STATEMENT OF THE CASE**

On July 24, 1986, the State of Illinois sought leave to file an original complaint against the Commonwealth of Kentucky. By its prayer for relief in its proposed bill of complaint, Illinois asked this Court to enter an order and decree:

"1. Declaring the boundary line between the State of Illinois and the Commonwealth of Kentucky to be the low-water mark on the northerly shore of the Ohio River

as it existed in 1792," the date of Kentucky's admission to the Union;

"2. Perpetually enjoining the Defendant (Kentucky) from disturbing in any manner the State of Illinois or its citizens from the peaceful use, and enjoyment of all land, water and jurisdiction within the boundaries of Illinois as established by the Court."

On October 14, 1986 (107 S. Ct. 265) the Court granted Illinois' motion to file an original complaint and on December 15, 1986, Kentucky filed an answer denying that "the northern boundary of the Commonwealth of Kentucky, as established from the cession of Virginia, the Virginia-Kentucky Compact and decisions of this Court, is the low-water mark on the northerly shore of the Ohio River as it existed in 1792" and raised certain affirmative defenses that the equitable principles of acquiescence and laches operate to place its boundary with Illinois not at the 1792 low-water mark, but at the low-water mark as it exists from time to time.

Kentucky also raises by affirmative defense "the principles of riparian boundaries, including accretion, erosion and avulsion" to apply to its boundary with Illinois, as "the low-water mark on the northwestern side of the Ohio River as it exists from time to time."

On March 2, 1987, the Court appointed the Honorable Robert Van Pelt, Senior Judge of the United States District Court for the District of Nebraska as Special Master in this case.

By order, dated June 27, 1988, the Court appointed the undersigned, Matthew J. Jasen, to succeed Judge Van Pelt, who died April 27, 1988.



The parties spent approximately three years in discovery, which involved numerous depositions and extensive production of documents. The proceedings before the Special Master took place in January 1990 after which the parties were granted additional time to further develop the record on the affirmative defense issue of acquiescence raised by Kentucky. Additional depositions, exhibits and documents were filed in April, 1990 and considered by the Special Master in rendering this report.

## II.

**THE ISSUE PRESENTED**

WHETHER THE BOUNDARY LINE BETWEEN ILLINOIS AND KENTUCKY IS THE LOW-WATER MARK ON THE NORTHERLY SIDE OF THE OHIO RIVER AS IT EXISTED IN THE YEAR OF 1792 WHEN KENTUCKY BECAME A STATE OR THE LOW-WATER MARK AS IT EXISTS FROM TIME TO TIME?

---

## III.

**FACTUAL FINDINGS AND  
LEGAL ANALYSIS**

In order to determine the issue presented, the law and the facts bearing upon the following questions must be analyzed and answered:

A. ARE PRIOR DECISIONS OF THIS COURT ESTABLISHING THE BOUNDARY BETWEEN THE COMMONWEALTH OF KENTUCKY AND THE STATES OF INDIANA AND OHIO, TO BE THE LOW-WATER MARK ON THE NORTHERLY SIDE OF THE OHIO RIVER AS IT EXISTED IN THE YEAR 1792, CONTROLLING PRECEDENTS ON THE QUESTION OF KENTUCKY'S BOUNDARY WITH ILLINOIS?

B. DOES THE RECORD SUPPORT KENTUCKY'S AFFIRMATIVE DEFENSES OF ACQUIESCENCE, LACHES, ACCRETION, EROSION AND AVULSION TO SUSTAIN KENTUCKY'S CLAIM THAT ITS OHIO RIVER BOUNDARY WITH ILLINOIS IS THE SHORE LINE ON THE ILLINOIS SIDE OF THE RIVER, AS IT EXISTS FROM TIME TO TIME RATHER THAN THE 1792 LOW-WATER MARK?

C. HAS THE CONSTRUCTION OF DAMS ON THE OHIO RIVER BETWEEN ILLINOIS AND KENTUCKY PERMANENTLY RAISED THE LEVEL OF THE RIVER ABOVE ITS LEVEL IN 1792, AND AS A RESULT, THE PRESENT LOW-WATER MARK ON THE ILLINOIS SIDE OF THE RIVER IS FARTHER NORTH THAN IT WAS IN 1792?

## A.

**Are prior decisions of this Court establishing the boundary between the Commonwealth of Kentucky and the states of Indiana and Ohio, to be the low-water mark on the northerly side of the Ohio River as it existed in the year 1792, controlling precedents on the question of Kentucky's boundary with Illinois?**

"It is far too late in the day" (*Ohio v. Kentucky*, 444 U.S. 335 [1980]) for Kentucky to argue that the low-water mark on the northwest side of the Ohio River, as it exists from time to time, is its boundary with Illinois. Kentucky's Ohio River boundary with the States bordering it to the north has been before the Court several times (*Handly's Lessee v. Anthony, et al.*, 5 Wheat. 374 [1820]; *Indiana v. Kentucky*, 136 U.S. 479 [1890]; *Henderson Bridge Co. v. Henderson City*, 173 U.S. 592 [1899]; *Ohio v. Kentucky*, 444 U.S. 335 [1980], and I am of the opinion that the Court's holdings in those cases are controlling precedents here.

More than one hundred years ago, Chief Justice Marshall writing for a unanimous court in *Handly's Lessee v. Anthony, supra*, recognized that Kentucky's Ohio River boundary was not to be resolved by the general rule that the territory of each state bordering a river extends to the middle of the stream. Instead, after reviewing Virginia's Cession to the United States of lands had to the territory northwest of the Ohio River, the Chief Justice concluded that:

"When a great river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream, but when, as in this case, one State is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly-created State extends to the river only. The river, however, is the boundary". *Id.* at 377.

Clearly, the Court determined that the State of Virginia held title to land on both sides of the Ohio River prior to its cession to the United States of lands northwest of the Ohio River and retained the river as its boundary with the new territory ceded to the United States. Thus, when Kentucky entered into a compact with Virginia, it succeeded to Virginia's title to the land retained by Virginia along the Ohio River.

Seventy years after *Handly's Lessee* was decided, the Court, in *Indiana v. Kentucky*, 10 S. Ct. 1031, had an opportunity to pass on the question of whether Kentucky's Ohio River boundary with Indiana [part of the lands ceded to the United States by Virginia in 1783] was fixed at the time it was admitted into the Union to the low-water mark on the northwest side of the river or whether the boundary could be affected by any subsequent change of the Ohio River.

A unanimous Court held:

"[Kentucky] succeeded to the ancient right and possession of Virginia, and they could not be affected by any subsequent change of the Ohio River, or by the fact that the channel in which that river once ran is now filled up, from a variety of causes, natural and artificial, so that parties can pass on dry land from the tract in controversy to the State of Indiana. Its water might so depart from its ancient channel as to the leave on the opposite side of the river entire counties of Kentucky, and the principle upon which her jurisdiction would then be determined is precisely that which must control in this case. *Mississippi v. Kentucky*, 11 Wall. 395, 401. Her dominion and jurisdiction continue as they existed at the time she was admitted into the Union, unaffected by the action of the forces of nature upon the course of the river.

\* \* \* \* \*

"Our conclusion is, that the waters of the Ohio River, when Kentucky became a State, flowed in a channel north of the tract known as 'Green River Island,' and that the jurisdiction of Kentucky at that time extended, and ever since has extended, to what was then low-water mark on the north side of the channel; and the boundary between Kentucky and Indiana must run on that line, as nearly as it can now be ascertained, after the channel has been filled." *Id.*, 10 S. Ct. 1053, 1057.

Thus, the Court rejected all of Indiana's arguments pertaining to the date for establishing the low-water mark boundary and adopted the date espoused by Kentucky—June 1, 1792, the date of Kentucky's admission to the Union.

It is of no legal consequence that *Indiana v. Kentucky* concerned a portion of the Ohio River relating to the Indiana-Kentucky boundary since the applicable principles are the same and should have pertinent application here. Subsequent to the decision in *Indiana v. Kentucky*, the Court had several times reiterated the position taken in that case.

In *Henderson Bridge Co. v. Henderson City*, 173 U.S. 592 (1899), the issue there was the authority of the Kentucky Municipality of Henderson to tax a railroad bridge built across the Ohio River to the Indiana shore. In its recitation of relevant facts, the Court noted that City of Henderson's statutory boundary extended "to low-water mark on the Ohio River on the Indiana shore" and that it had the authority to tax the property within its jurisdiction. *Id.* at 594. Since both the grant of Henderson's boundary and the power to tax came directly from the State of Kentucky, the Court reasoned that the decisive question was whether the boundary of Kentucky itself extended to the low-water mark on the



Indiana shore. In deciding the question in favor of Kentucky and the City of Henderson, the Court cited its earlier decision in *Indiana v. Kentucky*:

"Referring to the channel of the Ohio River as it was when Kentucky was admitted to the Union, the court stated its conclusion to be that 'the jurisdiction of Kentucky at that time extended, and ever since has extended, to what was then low-water mark on the north side of that channel.'" *Id.*, at 613.

The most recent decision of the Court pertaining to Kentucky's Ohio River boundary is *Ohio v. Kentucky*, 444 U.S. 335 (1980). In that case, as in the present case, Kentucky repudiated the argument it put forth in *Indiana v. Kentucky* and contended that the low-water mark as it exists from time to time, not the low-water mark as it existed in 1792, was its northerly boundary with Ohio.

In overruling the exceptions of Kentucky to the report of the Special Master's recommendation that the boundary between Ohio and Kentucky "is the low-water mark in the northerly side of the Ohio River as it existed in the year 1792", the Court's majority noted again the special historical nature of Kentucky's boundary with the States to the north.

"It should be clear that the Ohio River between Kentucky and Ohio, or, indeed, between Kentucky and Indiana, is not the usual river boundary between States. It is not like the Missouri River between Iowa and Nebraska, see, e.g. *Nebraska v. Iowa*, 143 U.S. 359 or the Mississippi River between Arkansas and Mississippi. See *Mississippi v. Arkansas*, 415 U.S. 289 and 415 U.S. 302. See also *Iowa v. Illinois*, 147 U.S. 1; *Missouri v. Nebraska*, 196 U.S. 23; *Minnesota v. Wisconsin*, 252 U.S. 273; *New Jersey v. Delaware*, 291 U.S. 361; *Arkansas v. Tennessee*, 310 U.S. 563. In these customary

situations the well-recognized and accepted rules of accretion and avulsion attendant upon a wandering river have full application.

"A river boundary situation, however, depending upon historical factors, may well differ from the customary situation. See, for example, *Texas v. Louisiana*, 410 U.S. 702, where the Court was concerned with the Sabine River, Lake and Pass. And in the Kentucky-Ohio and Kentucky-Indiana boundary situation, it is indeed different. Here the boundary is not the Ohio River just as a boundary river, but is the northerly edge, with originally Virginia and later Kentucky entitled to the river's expanse." 444 U.S. at 337.

In response to Kentucky's argument that it is entitled to the river's expanse and that its northern boundary with Ohio should be "the low-water mark on the northwestern side of the Ohio River as it exists from time to time", the majority of the Court noted that:

"... it is far too late in the day to equate Ohio with the Missouri, with the Mississippi, or with any other boundary river that does not have the historical antecedents possessed by the Ohio, antecedents that fix the boundary not as the river itself, but as its northerly bank [as it existed in 1792]". *Id.* at 590.

Once again it must be stated that although *Ohio v. Kentucky* involved a portion of the Ohio River relating to the Ohio-Kentucky boundary, it is of no legal consequence since the applicable principles are the same and should have pertinent application in this case.

I conclude that prior decisions of this Court control this case, and that the boundary between the State of Illinois and the Commonwealth of Kentucky is the low-water mark on the northerly side of the Ohio River as it existed in the year 1792 and not the low-water mark on the northerly side as it exists from time to time.

## B.

Does the record support Kentucky's affirmative defenses of acquiescence, laches, accretion, erosion and avulsion to sustain Kentucky's claim that its Ohio River boundary with Illinois is the shore line on the Illinois side of the river, as it exists from time to time rather than the 1792 low-water mark?

Kentucky's Second, Third and Fourth Defenses allege that the equitable principles of acquiescence and laches operate to place its boundary with Illinois not at the 1792 low-water mark, as may be required by prior controlling decisions of this Court, but at the low-water mark as it exists from time to time.

Under the doctrine of prescription and acquiescence, it may be proved that one party has recognized through its actions a riparian boundary claim by another party. See *Michigan v. Wisconsin*, 270 U.S. 295, 308. That question, however, is one of fact, and the burden of establishing the affirmative defense of acquiescence is upon the party asserting it. E.g., *Maxwell Land Grant Co. v. Damson* (151 U.S. 586, 604).

Before beginning an examination of the facts and the evidence submitted, however, the basic requirements of the affirmative defense of acquiescence should be noted. It requires two things: (1) the long and continuous assertion of a claim of right on the one side, and (2) an acquiescence therein upon the other. See e.g., *Oklahoma v. Texas*, 272 U.S. 21, 47. Thus, if Kentucky claims, as it does, the benefit of this defense, it must demonstrate, by a preponderance of the evidence, that it has continuously asserted its boundary with Illinois to be the low-water mark on the northerly side of the Ohio River as it exists from time to time, and that Illinois has acquiesced therein.

Examining the facts and evidence presented on the first requirement of establishing the defense of acquiescence, it seems abundantly clear that Kentucky has not demonstrated a continuous assertion of right in favor of the boundary it has claimed in this litigation. Since at least the time of *Indiana v. Kentucky*, [1890], there are documented, official statements from all three branches of the Kentucky government identifying Kentucky's Ohio River boundary as the northern low-water mark as it existed in 1792, the date of Kentucky's admission to the Union.

Evidence of Kentucky's official acknowledgment from its executive branch of government is opinion number OAG63-847 issued by the Kentucky Attorney General on September 13, 1963 (Filing No. 12(i)). In responding to a request from the Kentucky Department of Fish and Wildlife Resources seeking an opinion as to the location of the northern boundary on the Ohio River, the Kentucky Attorney General offered the opinion that:

"The law, of course is that the boundary line between the states of Indiana and Kentucky is the low-water on the north shore of the Ohio as it existed when Kentucky became a state in 1792. *State of Indiana v. Commonwealth of Kentucky*, 10 S. Ct. 1051, 136 U.S. 479, 34 L. Ed. 329 (1889)." OAG 63-847 at 1.

The Attorney General also acknowledged that locating the 1792 line would be difficult as the level of the river has been raised since the construction of dams in the river so that "the old low-water mark does not under present water level conditions extend right to the Indiana shore." *Id.* at 2. While this opinion letter was specifically addressed to an Indiana-Kentucky border incident, the rationale employed by the Kentucky Attorney General would be also applicable to all the states bordering Kentucky on the Ohio River.

Kentucky submits that the opinion rendered by its attorney general is only advisory in nature and cannot be considered as controlling authority in an original action regarding the location of a boundary between two states. While this opinion from the chief legal officer of Kentucky may not, in and of itself, be controlling authority on the issue of acquiescence, it is certainly evident that the Commonwealth of Kentucky has not continuously asserted its boundary with the States bordering on the Ohio River to be the low-water mark as it exists from time to time.

In addition to this evidence from Kentucky's executive branch of government, documents have been introduced from the legislative branch of government that plainly refute Kentucky's position in this case. The first such document is Informational Bulletin No. 81 of the Kentucky Legislative Research Commission, dated December 1969, which addresses the question of Kentucky's Ohio River boundary (Filing No. 12(b)). In the Forward to this document it states, the subcommittee on the Ohio River boundary was established in 1966 to study the facts of the boundary problem due to the recurrence, over a one hundred and fifty year period, of litigation over the location of Kentucky's northern Ohio River boundary. The Forward also acknowledges that the boundary matter will finally be resolved by the United States Supreme Court (*Id.* at page ii). It should be obvious that these references to recurring litigation over a one hundred and fifty year period and the role of the Supreme Court in finally deciding the northern Ohio River boundary issue are hardly consistent with Kentucky's contention in this case that it has continuously asserted the low-water mark as it exists from time to time as its boundary.



Moreover, Chapter II of Informational Bulletin No. 81 contains the Legislative Research Committee's summary of the litigation involving Kentucky's Ohio River boundary. In a preface to the text of the Court's decision in *Indiana v. Kentucky*, *supra*, the report states:

"In *Indiana v. Kentucky*, 136 U.S. 479 (1890) the Supreme Court was confronted with a dispute as to the ownership of Green River Island which at the time of the suit was located on the north side of the Ohio River. In finding that at the time when Kentucky became a state, the low-water mark of the river was north of the island, the Court determined that the boundary between states of Indiana and Kentucky was the low-water mark on the Ohio River *as the mark existed in the year of 1792.*" (Emphasis added). Informational Bulletin No. 81 at 18.

Certainly, the Kentucky Legislative Research Commission did not consider that decision as support for Kentucky's present claim of the low-water mark as it exists from time to time, but viewed it as the Court later did in *Ohio v. Kentucky*, *supra*, as authority for the proposition that Kentucky's northern Ohio River boundary is the low-water mark as it existed in 1792. Kentucky submits that the opinions expressed and the statements made by a service agency to the Kentucky legislature, do not and cannot represent the sovereign position of the Commonwealth nor be binding authority in this litigation. As stated before in reference to an opinion by the Kentucky Attorney General, the opinions expressed and the statements made by the Kentucky Legislative Research Commission, may not, in and of themselves, be binding authority in this litigation on the issue of acquiescence, but they certainly constitute evidence which the Court may consider as to whether there was continuous assertion by the Commonwealth of



Kentucky that its boundary with the States bordering on the Ohio River was the low-water mark as it exists from time to time.

In December, 1972, the Kentucky Legislative Research Commission issued another report pertaining to Kentucky's Ohio River boundary (Informational Bulletin No. 93, Filing No. 12(a)). It is interesting to note that beginning with the Forward to the report, the joint committee of Kentucky's General Assembly, acknowledges "the relevance of the Supreme Court's decision in *Indiana v. Kentucky*." In addition, Part II of Informational Bulletin 93, entitled "Legal Opinion" states:

"Kentucky's North and Western boundary, to-wit, the low-water mark on the North shore of the Ohio River *as of 1792* has been recognized as the boundary based upon the fact that Kentucky was created from what was then Virginia." (Emphasis added). Informational Bulletin No. 93 at 3.

Following this statement, the report discusses the legal precedents supporting it, beginning with *Handly's Lessee v. Anthony* and ending with the Court's initial opinion in *Ohio v. Kentucky* (410 U.S. 646).

Interestingly, the report also responds to Ohio's claim in the proposed amendment to its complaint against Kentucky that its boundary with Kentucky was not the low-water mark on the northerly side of the Ohio River and that the Supreme Court's determination of the Indiana-Kentucky boundary in its decision in *Indiana v. Kentucky*, *supra*, was not binding on Ohio:

"... it would be hard to imagine that the boundary of Ohio would be in one location, and that of Indiana and Kentucky would be in another." Informational Bulletin No. 93 at 4.

At the hearing before the Special Master, Illinois argued that it is even harder to imagine that Kentucky's boundary on the Ohio River with both Indiana and Ohio would be in one location and its boundary with Illinois in another. Difficult to imagine as that may be, it is of course possible, but only if Kentucky establishes its affirmative defense of acquiescence as to Illinois.

Finally, it is significant to note that the report makes abundantly clear Kentucky's awareness of the consequences of its continued adherence to the 1792 low-water mark. At page 4 of the Informational Bulletin No. 93, it states:

"... and conceivably there could be places ... where a state on the north shore of the Ohio River may have a true boundary that extends as much as 100 yards or more into the stream. ..."

In its footnote 11 to this quote, the Kentucky Legislative Research Commission pointed out that one source for the conclusion was the series of quadrangular maps (quads) prepared under the auspices of the United States Geological Survey (U.S.G.S.). As noted in footnote 11, these maps contain the following language:

"The state boundary, as shown, represents the approximate position of the low-water line as determined from U.S. Corps of Engineers charts surveyed 1912 and supplementary information." Informational Bulletin No. 93 at 5.

Interestingly Kentucky eventually resolved its boundaries with Indiana and Ohio following the holding in *Ohio v. Kentucky*, 444 U.S. 335, by use of a series of maps prepared by the U.S. Geological Survey and based on the Corps of Engineers' survey of the northern low-water line of the Ohio River early in this century. (Filing No. 41, Exhibit 1, William E. Kreisle affidavit, par. 22-25).

The 22 U.S.G.S. quads portraying the Ohio River between Illinois and Kentucky do not support Kentucky's position in this case, as all but one of the series showing the Illinois-Kentucky boundary contain language virtually identical to that quoted above. Furthermore, even on that sheet, known as the Golconda quad, the boundary is shown some distance from the current Illinois shore, and it seems apparent that the boundary line shown there is also meant to reflect the 1792 low-water mark as determined from the Corps of Engineers survey conducted before the construction of the dams on the river. (See, Filing No. 41, Exhibit 1, William E. Kreisle affidavit, par. 22-29 and Filing No. 44, Exhibit 7).

In addition to these documents from the legislative and executive branches of Kentucky's government that fail to support the first requirement of establishing its affirmative defense of acquiescence, the decisions of the Kentucky courts likewise refute its assertion that the Ohio River boundary between Illinois and Kentucky is the low-water line as it exists from time to time.

From Illinois' point of view, the case of *Perks v. McCracken*, 169 Ky. 590 (1916) can be construed as being most favorable to it. In this case, the plaintiff, McCracken brought suit against the defendant, Perks and another, based upon his claim that he owned a towhead in the Ohio River near Mound City, Illinois, and that the defendants had unlawfully removed sand and gravel from the towhead. The Kentucky Supreme Court noted that the plaintiff traced his title to a patent issued in 1854 by Kentucky and stated that the case would be resolved on the question whether the towhead was part of Kentucky or the State of Illinois.

Citing *Indiana v. Kentucky*, *supra*, the court concluded that the decisive question was:

"... where was the low-water mark at the time Kentucky became a state, and does the island in question lie between the low-water mark as it then existed and the Kentucky shore? If so, it is part of Kentucky." 169 Ky. at 591.

Although the evidence presented at trial did not extend back to 1792, the Court, nevertheless held, that the proof establishing that for a great many years the land in question was an island, it was sufficient to find that it was within Kentucky.

Though *Perks v. McCracken*, is the only case cited to me that defines Kentucky's Ohio River boundary specifically as being the 1792 low-water mark, there are a number of other Kentucky cases defining the Ohio River boundary only as the low-water mark, rather than in the terms asserted by Kentucky—as the low-water mark as it exists from time to time. *Commonwealth v. Henderson Co.*, 371 S.W. 2d 27 (1963); *Louisville Sand & Gravel Co. v. Ralston*, 266 S.W. 2d 119 (1954); *Shannon v. Streckfus Steamers*, 279 Ky. 649 (1939); *City of Covington v. State Tax Commission*, 231 Ky. 606, 21 S.W. 2d 1010 (1929); *Willis v. Boyd*, 224 Ky. 732, 7 S.W. 2d 216 (1928); *Bedford-Nugent Co. v. Herndon*, 196 Ky. 477 (1922); *Nicoulin v. O'Brien*, 172 Ky. 473, 189 S.W. 724 (1916) Aff'd 248 U.S. 113 (1918); *Ware v. Hager*, 126 Ky. 324, 103 S.W. 283 (1907); *Commonwealth v. Louisville & E. Packet Co.*, 117 Ky. 936, 80 S.W. 154 (1904); *Meyler v. Wedding*, 107 Ky. 310, 53 S.W. 809 (1899); rev'd on other grounds, 192 U.S. 573 (1899); *Louisville Bridge Co. v. City of Louisville*, 81 Ky. 189, 5 Ky. L.R. 16 (1833); *Berry v. Snyder*, 66 Ky. (8 Bush.) 266 (1867); *Spaulding v. Simms*, 61 Ky. (4 Metc.) 285 (1863); *McFall*

*v. Commonwealth of Kentucky*, 59 Ky. (2 Metc.) 394 (1859); *McFarland v. McKnight*, 45 Ky. (G.B. Mon.) 500 (1846); *Church v. Chambers*, 33 Ky. (3 Dana) 274 (1835); *Fleming v. Kenny*, 27 Ky. (4 J.J. Marsh) 155 (1830).

Nevertheless, Kentucky argues that the northerly low-water referred to in these decisions necessarily means the prevailing low-water mark under the universally accepted principle that the boundary follows the stream in its original channel and cites in support of this interpretation *Arkansas v. Tennessee*, 246 U.S. 158, 647, 648 (1919); *Nebraska v. Iowa*, 143 U.S. 359, 361-62 (1892); and *Berry v. Snyder*, 66 Ky. (3 Bush.) 266, 279 (1867).

The Supreme Court cases cited do not support Kentucky's view as the principle espoused by the Court in those cases does not apply to this case. The *Arkansas* case involves two states bounded by the Mississippi River and the *Nebraska* case involves two states bounded by the Missouri River. In both of these cases, the legal definition of river boundary is the same—the middle of the navigable river, or the Thalweg. (See *Iowa v. Illinois*, 147 U.S. 1 (1893)). The Ohio River is another matter. The Court in *Ohio v. Kentucky* made it abundantly clear that the Thalweg doctrine, and the attendant rules regarding accretion and avulsion, are not applicable in any case involving Kentucky's Ohio River boundary.

"It should be clear that the Ohio River between Kentucky and Ohio, or, indeed, between Kentucky and Indiana, is not the usual river boundary between States. It is not like the Missouri River between Iowa and Nebraska—see e.g. *Nebraska v. Iowa*, 143 U.S. 359, 12 S. Ct. 396, 36 L. Ed. 186 (1892), or the Mississippi River between Arkansas and Mississippi. See *Mississippi v. Arkansas*, 415



U.S. 289, 94 S. Ct. 1046, 39 L. Ed.2d 333 (1974), and 415 U.S. 302, 94 S. Ct. 1052, 39 L. Ed.2d 342 (1974). See also *Iowa v. Illinois*, 147 U.S. 1, 13 S. Ct. 239, 37 L. Ed. 55 (1893); *Missouri v. Nebraska*, 196 U.S. 23, 25 S. Ct. 155, 49 L. Ed. 372 (1904); *Minnesota v. Wisconsin*, 252 U.S. 273, 40 S. Ct. 313, 64 L. Ed. 558 (1920); *New Jersey v. Delaware*, 291 U.S. 361, 54 S. Ct. 407, 78 L. Ed. 847 (1934); *Arkansas v. Tennessee*, 310 U.S. 563, 60 S. Ct. 1026, 84 L. Ed. 1362 (1940). In these customary situations the well-recognized and accepted rules of accretion and avulsion attendant upon a wandering river have full application.

A river boundary situation, however, depending upon historical factors, may well differ from that customary situation . . . . And in the Kentucky-Ohio and Kentucky-Indiana boundary situation, it is indeed different." 444 U.S. at 337.<sup>1</sup>

This rejection in *Ohio v. Kentucky* of the Thalweg doctrine and the attendant rules regarding accretion and avulsion to any case involving Kentucky's Ohio River boundary should make it absolutely clear that Kentucky's reliance upon *Arkansas v. Tennessee* and *Nebraska v. Iowa* is misplaced.

Kentucky also offered proof on the first prong of its affirmative defense, that it has continuously asserted its boundary with Illinois to be the low-water mark on the northerly side of the Ohio River as it exists from time to time, the testimony of four law enforcement officers, two coroners and two Coast Guard officers concerning a number of incidents on the Ohio River.

---

<sup>1</sup> Although the Court's 1918 opinion in *Arkansas v. Tennessee* is not cited in the above excerpt, the Court does cite *Iowa v. Illinois*, and the opinion in *Arkansas v. Tennessee* makes it clear that the result there is controlled by *Iowa v. Illinois*.



The first of these witnesses to be deposed was Charles Claude Storms, a retired Kentucky Water Patrolman. (Filing No. 23(a)). Mr. Storms testified that he was a water patrolman "off and on 16 years" (Filing No. 23(a) at p. 4) and was assigned to duty on the Ohio River opposite the State of Illinois for approximately eight years. Regarding the issuance of citations on the Ohio River, he stated he would issue a citation anywhere on the river but would not issue one to a boat in the river tied to the Illinois shore. Mr. Storms' understanding of the location of the Ohio River boundary was uncertain, as he testified that it was "the waterline, high-water mark or low-water mark of each adjoining state" and in reply to a question on direct examination testified:

"Q. 26 ... If the river were high, and if the river level changed, was it your understanding that the boundary changed?

A. It never changed the boundary as far as I know."

The second Kentucky law enforcement officer, David Loveless, a Captain in the Division of Law Enforcement with the Department of Fish and Wildlife, stated that his understanding of the Kentucky and Illinois boundary was "the normal standing pool of the Ohio River" which he equated with the low-water mark. (Filing No. 23(c) pp. 4-8).

The third witness, Steven Owens, a Kentucky Water Patrolman since 1976, testified that his understanding of the boundary between Illinois and Kentucky "was the water edge of the northern shore." (Filing No. 23(d) pp. 5-6). When asked if his understanding of the location of the boundary was recorded anywhere in Water Patrol Department's rules and procedures, he replied:

"I'm not exactly sure. It's just—it's always been the policy that was handed down to me, and I understand that that's the way Constitution read."  
At p. 6.

Contrary to the testimony of fellow Water Patrol Officer Storms, Mr. Owens stated he would include in his jurisdiction a boat tied to the Illinois shore. (At pp. 6-7).

The final law enforcement officer deposed, David Donan Jenkins, had been with the Kentucky Department of Fish and Wildlife, Law Enforcement Division for 31 years and had been a captain in the division since 1985. When asked where he understood the Illinois-Kentucky boundary to be, he replied that it was the point where the river touched the bank. While Jenkins stated he was unaware of any Departmental instructions regarding the boundary location, he testified:

"You know, prior to me, everybody knows that the Ohio River is Kentucky." At p. 6.

Kentucky takes the position that this remark, as well as other similar statements made by the other deposed law enforcement officers, establishes its continuous assertion that the boundary with Illinois is the low-water mark on the northerly side of the Ohio River as it exists from time to time. It is difficult to accept this conclusion in view of Kentucky's prior repeated official statements claiming the low-water mark as it existed in 1792 when Kentucky became a state, to be its boundary. Starting with its position in *Indiana v. Kentucky, supra*, and including an opinion of its attorney general, a court decision in *Perks v. McCracken, supra*, and a Legal Opinion contained in Informational Bulletin No. 93 issued by the Kentucky Legislative Research Commission, Kentucky has consistently claimed its northern border on the Ohio River to be the 1792 low-water mark, and not the low-water mark as it exists from time to time.

Depositions from two coroners were also presented by Kentucky on the acquiescence issue. The first, Jerry Beyer, coroner of McCracken County since 1980, and deputy coroner from 1972 to 1980, stated that the crucial factor in determining whether an accident or drowning victim comes within his jurisdiction was not the place of death but the place where the body was recovered. (Filing No. 29, p. 13). He testified as to four incidents on the Ohio River. None of the incidents support Kentucky's defense of acquiescence. In the first drowning incident, Mr. Beyer was unable to recall how far from the Illinois shore the body was recovered. (Filing No. 29, p. 4). In the second drowning, the body was recovered "in the center of the river, hung up on the dam wickets." (Filing No. 19, p. 7). The third drowning, the body was recovered approximately 50 yards from the Illinois bank. In the last drowning testified to by Mr. Beyer, involving a person named Dennis Crane, the body was recovered near the Ballard County community of Oscar on the Kentucky side of the Ohio.

The second coroner, Harry Van Smith, coroner of Livingston County, Kentucky for eleven years, testified that there were an average of one or two deaths per year on the Ohio River in his area and that in his experience those deaths were always handled by him rather than the Illinois coroner.

In order for Kentucky to establish support for its position of acquiescence on the part of Illinois, it must be shown that the bodies recovered by Kentucky coroners from the Ohio River were north of the 1792 low-water line, as Illinois acknowledges Kentucky's jurisdiction south of that line. The evidence does not establish that the bodies handled by the two Kentucky coroners took place on the Illinois side of the 1792 low-

water mark. Even if this evidence regarding the few deaths handled by Coroners Beyer and Smith was accepted as some support for Kentucky's claims of continuous assertion that its boundary with Illinois was the low-water water as it exists from time to time, it is of little weight when considered with the evidence offered by Illinois that for more than eighty years, Illinois coroners have handled at least 214 bodies recovered in the Ohio River (Filing No. 31, Illinois Supplemental Response to Kentucky's First Set of Interrogatories).

While there is evidence in the record that the current Illinois coroners differ as to their practice regarding bodies found on the Ohio River and their opinions as to where they believe the boundary between Illinois and Kentucky to be, some of the coroners have worked out informal practical accommodations with their counterpart coroners in Kentucky in exercising jurisdiction over drowning victims, such as for example, "if it was somebody from Illinois, the Illinois coroner would handle the situation, and if it was somebody from Kentucky, the Kentucky coroner would handle it." (Filings Nos. 46, 34).

Such informal practical accommodations, do not, in my opinion, constitute acquiescence since they are not based on any concession of right by either side, but rather, brought about by uncertainty on both sides as to the location of the actual boundary. Like the Kentucky law enforcement officers and coroners, the Illinois coroners were unaware of their state's position as to the Illinois-Kentucky boundary, and as a result their opinions on its location were as varied as those of the Kentucky witnesses.

In addition to the law enforcement officers and coroners whose testimony has been reviewed, the record contains depositions of two U.S. Coast Guard Officers, Commander John L. Bailey (Filing No. 23(b)) and Captain Thomas H. Robinson (Filing No. 25). Both testified as to a strike incident at a cement plant near Joppa, Illinois and Captain Robinson also testified as to two accidents on the Ohio River. I find that their testimony, as a whole, provides very little support for Kentucky's claim of acquiescence, as it reflects the sort of uncertainty and confusion that are incompatible with a finding of acquiescence.

In reviewing all the evidence produced by Kentucky on the first requirement of establishing the affirmative defense of acquiescence—that it has continuously asserted its boundary with Illinois to be the low-water mark on the northerly side of the Ohio River as it exists from time to time—I find that the record does not support such a finding.

In view of the above finding, it would not be necessary to discuss Kentucky's second requirement of establishing its affirmative defense of acquiescence—that Illinois acquiesced through its actions, to the low-water mark of the Ohio River as it exists from time to time as its boundary with Kentucky. However, in carrying out my principal function—the development of an evidentiary record—I have chosen to make factual findings on the entire range of issues that the parties have presented for resolution for the Court to consider in making its final determination.

Examining the facts and evidence presented on the second requirement of the doctrine of acquiescence, I will first consider the documents and incidents relied upon by Kentucky, and following that I will pass on evidence



submitted by Illinois in opposition to Kentucky's claim that it had exercised sole jurisdiction over the entire breadth of the Ohio River.

The first documents relied upon by Kentucky consist of two letters dated September 28, 1954 from H.E. Diers, Assistant Engineer of Maintenance of the Illinois Department of Public Works and Buildings. These letters purport to discuss marking the Illinois-Kentucky boundary with a sign at the location of the Ohio River bridge near Cairo, Ohio. In the letter, addressed to William D. MacLeod, District Engineer, the author says of the boundary language contained in the 1870 Illinois Constitution that, "This I believe can be interpreted to mean the shoreline at the mean, normal, water elevation along the Illinois shore." (Filing No. 12(m)). Similarly, in the second letter addressed to W.J. Crouse, Director of Maintenance, Kentucky Department of Highways, Mr. Diers states that "[i]t is possible" that the boundary can be fixed as he suggests and that it "can probably be determined by examination of the gauge readings in the U.S. Engineers' Office at Cairo." (Filing No. 12(l)). Diers' choice of words, such as "This I believe can be interpreted", "[i]t is possible that the boundary can be fixed" and that it "can probably be determined" hardly reflect certainty. This conclusion is reinforced by the final paragraph of the second letter in which Diers asks the Director of Maintenance, Kentucky Department of Highways, whether he "concur[s] in this method or if you will be kind enough to make a suggestion in regard to the establishment of this state line." In any event, it is my opinion that the purpose of the Dier correspondence was not to locate the state boundary precisely but simply to place a sign on the bridge somewhere near the approximate state line to alert motorists that they were entering or leaving Kentucky or Illinois.



In addition to the Dier correspondence, Kentucky also offers evidence regarding four bridges which connect Kentucky with Illinois, as evidence of acquiescence on the part of Illinois (Filing No. 61, Exhibits 53, 61, 64, 66a). Illinois' position in regard to this evidence is that these documents are equivocal at best and do not support Kentucky's claim of acquiescence. In support of this conclusion, Illinois cites the response of Special Master Judge Van Pelt in his report No. 27, Original, *Ohio v. Kentucky*, January 3, 1979, to similar evidence regarding bridge agreements which Kentucky offered in that earlier case. In rejecting Kentucky's offer of this documentation, Judge Van Pelt said at pp. 13-14:

"Your Special Master concludes that it would not be a benefit to take evidence involving the bridge contracts, and undoubtedly an agreement as to the boundary was made merely to expedite and facilitate the construction of the bridges. At approximately the same time as these contracts were being executed, there were Kentucky legal opinions above mentioned recognizing the 1792 boundary. Your Special Master prefers to rely on the previous cases in this Court rather than bridge agreements."

The other exhibits (54-60, 62, 63, 65-69) offered by Kentucky pertaining to bridges do not support Kentucky's claim of acquiescence on the part of Illinois.

In support of its defense of acquiescence, Kentucky also relies upon the boundary descriptions contained in the Illinois Constitutions of 1818, 1848 and 1870, which describe Illinois boundaries as follows:

"Beginning at the mouth of the Wabash river; thence up the same, and with the line of Indiana, to the northwest corner of said state; thence east, with the line of the same state, to the middle of Lake Michigan, thence north, along the middle of said lake, to north latitude 42° and 30' thence west to

the middle of the Mississippi river, and thence up the latter river, *along its northwestern shore*, to the place of beginning." Illinois Constitution of 1818, Articles Introduction; Illinois Constitution of 1848, Art. 1; and Illinois Constitution of 1870, Art. 1. (Emphasis added).

The boundary language incorporated by the framers of Illinois' 1818 Constitution, and thereafter copied in the Constitutions of 1848 and 1870, is clearly a verbatim recitation of the language used by Congress to describe the newly created State of Illinois' boundaries in its Enabling Act of April 18, 1818 (Filing No. 41, Exhibit 14). What Congress intended to be the southern boundary of Illinois, was the same southern boundary granted the states of Ohio and Indiana when they were formed. As Kentucky acknowledges in its Answer, Illinois, like Ohio and Indiana, was created from the territory ceded by Virginia to the United States "situate, lying and being, northwest of the river Ohio." I find nothing in the legislation creating the Northwest Territory (Ordinance of 1787. U.S. Rev. Stats. 2d Ed. 1878, p. 13; Filing No. 41, Exhibit 15), the Indiana Territory (Act of Congress, May 7, 1800. 2 U.S. St. at Large, 58; Filing No. 41, Exhibit 16) or the Illinois Territory (Act of Congress, Feb. 3, 1809. 2 U.S. St. at Large, 514; Filing No. 41, Exhibit 17) which would suggest that the United States meant to convey a different southern boundary to Illinois than was conveyed to Ohio and Indiana, to wit, the low-water mark as it existed in 1792.

Kentucky also relies upon the *Geography of Illinois*, written by Douglas C. Ridgley and published in 1921 by the University of Chicago Press as documentary evidence of Illinois' acquiescence to a boundary other than the 1792 low-water mark. I agree with Illinois'

position that this privately published book does not constitute evidence of acquiescence on its part. As a work of private scholarship, it represents only the opinions of the author and those opinions should not be attributable to the State of Illinois.

Finally, Kentucky argues that the document entitled "Report of the Joint Select Committee Appointed to Investigate the Nature and Extent of the Jurisdiction of Illinois Over the Ohio River" is evidence of acquiescence on the part of Illinois. This report (Filing No. 12(h)) was submitted by the Committee to the Illinois Legislature on January 25, 1849. The substantive portion of the report begins with the following statement:

"It is conceded that the Ohio River, to low-water mark, is included within the limits of the State of Kentucky." Report of Joint Select Committee at 1.

Illinois concedes that in 1849, prior to the construction of dams on the Ohio River, the boundary between Illinois and Kentucky was the low-water mark, the same as it was in 1792 when Kentucky became a state. However, subsequent to the construction of dams on the river, the low-water mark moved farther north. Thus, even if this document is assumed to be evidence of acquiescence to the low-water mark as it existed in 1849, it certainly does not constitute acquiescence to the low-water mark as subsequently altered by the construction of the dams.

There is nothing in the second page of the report, dealing with the history of Virginia's cession of territory to the United States and the conditions set forth regarding the formation of states from that territory, which can be said to show acquiescence by Illinois.

The remainder of the report is concerned with a subject not at issue in this case—the right of Illinois and the other states bordering Kentucky along the Ohio

River to concurrent jurisdiction with Kentucky over the entire breadth of the river. The existence of concurrent jurisdiction over the Ohio River can be traced to a Virginia statute passed in 1789 which proposed making the district of Kentucky a separate state. Section eleven of the legislative enactment, known as the Virginia Compact, provides as follows:

*"Seventh, that the use and navigation of the river Ohio, so far as the territory of the proposed state, or the territory which shall remain within the limits of this commonwealth lies thereon, shall be free and common to the citizens of the United States, and the respective jurisdictions of the commonwealth and the proposed state on the river as aforesaid, shall be concurrent only with the states which may possess the opposite shores of said river."* 13 Henings Stat. 17. (Emphasis added).

Concurrent jurisdiction has nothing to do with the location of the boundary on the Ohio River, but rather refers to a shared jurisdiction granted the states on both sides of the river. (*Wedding v. Meyler*, 192 U.S. 573 [1904]; see also *Nicoulin v. O'Brien*, 248 U.S. 113 [1918] and *Nielsen v. Oregon*, 212 U.S. 315 [1909]).

Passing on to the evidence submitted by Illinois in opposition to Kentucky's claim that it had exercised sole jurisdiction over the entire breadth of the Ohio River and that Illinois had acquiesced therein, Illinois points out that there is no Kentucky case cited that asserts Kentucky's boundary with Illinois, or any other bordering state on the northwest side of the Ohio River, to be the low-water mark "as it exists from time to time." Likewise, there is no Illinois case acknowledging that to be Illinois' southern boundary.

In *Ensminger v. People*, 47 Ill. 384 [1868], decided before the construction of dams on the Ohio River, the Illinois-Kentucky boundary is placed at the low-water mark on the Illinois shore. This decision does not support Kentucky's claim of acquiescence to the low-water mark as subsequently changed by the construction of dams, it merely speaks of the low-water mark as it existed in 1869.

The Court in *Union Bridge Co. v. Industrial Com.*, 287 Ill. 396 [1919] ruled that since the facts established that the accident occurred 1185 feet south of the low-water mark, it was outside the jurisdiction of Illinois. How the court determined the location of the low-water mark to measure the 1185 feet is not stated and therefore, like *Ensminger*, does not support Kentucky's claim of acquiescence on the part of Illinois to a low-water "as it exists from time to time."

*Joyce-Watkins Co. v. Industrial Com.*, 325 Ill. 378 [1927], like *Union-Bridge*, *supra*, involved the question of the Illinois Industrial Commission's jurisdiction over an accident that took place on or over the Ohio River. The injury took place on tracks extended from the Illinois shore out into the river, roughly 8-10 feet from the river's edge. The employer, Joyce-Watkins Co., argued that since the injury took place beyond the water's edge, it occurred outside the State of Illinois.

In rejecting this and several related arguments made by the plaintiff, the court began by citing *Indiana v. Kentucky*, *supra*, for the proposition that Illinois' boundary with Kentucky was the low-water mark on the northwest shore of the Ohio River. It then noted that no commission had ever been appointed to determine the location of that line and further noted that it was not necessary or appropriate to ascertain the actual



boundary in the case before it, since the phrase "low-water mark", by definition, meant "the point to which the water receded at its lowest stage." *Id.* at p. 381. Thus, in order to rule on the case before it, the court did not need to ascertain the precise location of the boundary as it existed on the day of the accident, but had only to determine if the low-water mark at the point in question had ever been south of the place of injury. The court, therefore concluded that since there was evidence presented that a low-water mark had at one time existed approximately 250 feet south of the place of injury, it had occurred within the State of Illinois.

Although the Illinois Supreme Court in the *Joyce-Watkins* case misapplied the holding in *Indiana v. Kentucky*, it is abundantly clear that the court's decision directly contradicts Kentucky's claim that Illinois had acquiesced in a low-water mark as it exists from time to time. Certainly, the *Joyce-Watkins* rule called for a moving boundary, but the movement contemplated by the court would be exclusively in favor of Illinois as each record drought would move the boundary further southward.

The continued adherence by the Illinois Courts to the *Joyce-Watkins* rule as late as 1973 (see *People ex rel. Scott v. Dravo Corp.*, 10 Ill. App. 3rd 944), clearly indicates that Illinois has not acquiesced to Kentucky's boundary claim of a low-water mark as it exists from time to time.

Evidence of assertions of jurisdiction by Illinois local governments over a portion of the Ohio River by the enactment of ordinances is found in Filing No. 55 (Exhibits 34-55). Several of these ordinances, while not addressing the boundary specifically, involve assertions of jurisdiction over portions of the Ohio River since they



prohibit certain conduct on the waters of that river. Exhibit 50, for example, prohibits keeping a boat or watercraft for the purpose of prostitution on the Ohio River within the jurisdiction of the Village of Joppa, Illinois. Exhibits 54 and 55 involve ordinances of the cities Cairo and Mound City, Illinois, which describe the boundaries of these cities as extending to the middle of the main channel of the Ohio River.

Additional evidence of Illinois' assertion of jurisdiction over the Ohio River is found in permits issued by the Illinois Department of Transportation, and its predecessor, the Department of Public Works and Buildings. The permits issued are generally grouped into five categories: (1) construction of docks, mooring anchors, access ramps and other similar structures built in, on or over the river, (2) sand and gravel dredging, (3) bridge construction, (4) bank protection and (5) sewage outlets or water inlets. In presenting this evidence, Illinois does not claim that these permits specifically reflect an assertion of jurisdiction to the 1792 low-water mark, but instead claims that the requirement of obtaining a permit to build structures located in the river adjacent to the Illinois shore constitutes an assertion by it that some portion of the waters of the Ohio River are within its boundaries pursuant to "AN ACT in relation to the regulation of the rivers, lakes and streams of the State of Illinois" (Ill. Rev. Statutes, 1987, Ch. 19, par 52, *et seq.*). Section 18 of the Act (Ill. Rev. Statutes, Ch. 19, par 65)<sup>2</sup> provides that:

"It is unlawful to make any fill or deposit of rock, earth, sand, or other material, or any refuse matter of any kind or description or build or commence the

<sup>2</sup> This statute, including the permit requirement, was first enacted June 10, 1911 and was effective July 1, 1911 (Laws of Illinois 1911, p. 115).

building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, causeway, harbor, or mooring facilities for watercraft, or build or commence the building of any other structure, or do any work of any kind whatsoever in any of the *public bodies of water within the State of Illinois*, without first submitting the plans, profiles, and specifications therefor, and such other data and information as may be required, to the Department of Transportation of the State and receiving a permit therefor signed by the Secretary of the Department and authenticated by the seal thereof." (Emphasis added).

While approximately 70 Ohio River permits were issued by the State of Illinois between April 10, 1922 and September 15, 1988 (See Filings 42(a)-42(d), 32, 55 [Exhibits 29-33]), it will suffice to discuss several of these permits as representative of Illinois' assertion of jurisdiction over a portion of the river.

Permit No. 11440, issued to Peabody Coal Co. on the 24th of September 1967, involved a structure built past the normal pool elevation of the Ohio River at Shawneetown, as it existed on July 11, 1967. The entire structure extends approximately 160 feet into the river from the normal pool line. (Filing No. 55, Vol. 1, Exhibit 29).

Permit No. 4814, issued to Yourtee-Roberts Sand Co. on February 5, 1941 "to dredge sand and gravel in *that part of the Ohio River within the State of Illinois* between the mouth of the river and Metropolis in Massac County, Illinois," (Emphasis added). (Filing 42(a), Exhibit 20, Vol. 1, p. 171).

A similar exercise of jurisdiction by the State of Illinois is shown in the issuance of Permit No. 17757 to the Ohio Power Company on November 22, 1983 for

dredging approximately 300,000 cubic yards of material from the river entrance to the Cook Terminal. The diagram attached to the permit shows the area to be dredged to be a distance south of the existing shoreline (Filing No. 42(d), Exhibit 20, Vol. 4, p. 2055).

Permit No. 13870, issued to Indiana Franklin Realty, Inc. on October 9, 1974 for construction of a coal loading and dock facility in the Ohio River, described the dock to be built as extending "approximately 300' from shoreline at normal pool elevation." (Filing No. 42(d), Exhibit 20, Vol. 3, p. 1201).

Permit No. 14049, issued to Bunge Corporation on July 4, 1975, for the construction of a facility extending 215 feet into the Ohio River (Filing No. 55, Vol. 1, Exhibit 31).

Additionally, pursuant to Section 12 of the Illinois Environmental Protection Act and the Federal Clean Water Act, the Illinois Environmental Protection Agency requires an Illinois permit for the construction or installation of any sewer outlet discharging contaminants "into the waters of this State".

This continued and long-standing assertion of jurisdiction by Illinois over an undefined portion of the Ohio River is certainly incompatible with Kentucky's claim to have exercised exclusive jurisdiction over the entire breadth of the river and its claim that Illinois has acquiesced to Kentucky's exclusive assertion of authority.

As stated before in this report (p. 2), in the STATEMENT OF THE CASE, following oral argument on the parties' cross-motions for summary judgment on January 4, 1990, I was of the opinion that there may be

further evidence available on the issue of acquiescence which both parties should endeavor to discover and submit for consideration.

Both parties submitted such additional documents and evidence in support of their respective positions. Illinois' submission included six major categories—Criminal Prosecutions, Additional Permits Issued by the Illinois Department of Transportation, Assertions of Jurisdiction by Illinois Local Governments, Illinois Environmental Protection Agency Permits, Boat Licensing Under Illinois Law and Taxation. (Filing Nos. 53-59).

Kentucky's supplemental submission covered eight categories, including—Bridges, Taxation, Mineral Leases, Fishing and Musseling Licenses, Waterfowl, Boats and Boating, Dams and Historical Evidence. (Filings Nos. 60-65).

In response to Kentucky's supplemental submission, Illinois submits that very little of what Kentucky has presented is of any relevance to the resolution of the dispute here and does not divest Illinois of the jurisdiction it is rightfully entitled to under *Ohio v. Kentucky*, 444 U.S. 435 [1980] and *Indiana v. Kentucky*, 136 U.S. 479 [1890].

In Kentucky's response to Illinois' supplemental material, the Commonwealth submits that the material offers no evidence to refute Kentucky's affirmative defense of acquiescence and laches. Rather, Kentucky argues, much of the supplemental material supports Kentucky's position that Illinois has always recognized and acquiesced to Kentucky's assertion of jurisdiction and dominion over the Ohio River in its entirety, before and after the construction of the dams.

In examining and evaluating all of the supplemental material submitted by the parties, I am impressed by the evidence submitted concerning the taxation or, more accurately, the lack of taxation of the vast majority of structures and buildings extending from the Illinois shoreline into the Ohio River. Fifteen such structures were identified (See Filing No. 61). One such structure, the Electric Energy power plant near Joppa, Illinois, has been taxed, *i.e.* at least a portion of that part of the plant that extends south of the Illinois Shoreline.

In addition, Kentucky submitted a tax bill to Bulk Services of Mound City, Illinois in 1984, which the taxpayer paid under protest, claiming that the property in question is within the State of Illinois and not Kentucky. It is interesting to note that the Bunge plant, one of the 15 structures identified, located in Cairo, Illinois which extends 170 feet south of the Illinois shore into the Ohio River, was taxed by both states. The first 70 feet of the structure extending south of the Illinois shore was taxed by Illinois and the remaining 100 feet was agreed to be subject to Kentucky taxes (See Filing No. 56, Exhibit 64). Of the remaining 12 structures extending southward into the Ohio River, no tax has been imposed by Kentucky.

This evidence hardly demonstrates that Kentucky has continuously asserted exclusive jurisdiction over the entire breadth of the Ohio River. Rather, it shows that there is uncertainty in both states as to the exact location of the boundary.

In support of its claim of exclusive jurisdiction over the Ohio River, Kentucky also relies upon evidence that it imposed *ad valorem* taxes on barges and other watercraft traveling on the Ohio River, including a



number of Illinois owned barge companies. This tax was based on a ratio of the number of miles traveled on the Ohio River in Kentucky over total miles traveled.

Illinois submits that this information is irrelevant to the present controversy, as Illinois acknowledges that most of the Ohio River is within the boundary and jurisdiction of Kentucky, as set out in the affidavit of William Kreisle (Filing No. 41, Exhibit 1). Although the distance from Illinois shore of the 1792 low-water mark, as reflected in the U.S. Corps of Engineers' survey line varies, in many instances it is only 100 feet from the Illinois shore. Illinois has attached to Filing No. 63, Appendix 1, to show the location of the sailing line of the Ohio River, as prepared by the Corps of Engineers, relative to the shoreline, which discloses that for the majority of the length of the river between Illinois and Kentucky, the sailing line is either close to the center of the river or near the Kentucky shore. Only rarely does it approach to within even 250-300 feet of the Illinois shoreline. Thus, the evidence of the imposition of *ad valorem* taxes on barges and other watercraft traveling on the Ohio River within the acknowledged jurisdiction of Kentucky, does not support Kentucky's claim of exclusive jurisdiction of the entire breadth of the river.

The submission of old newspaper articles by Kentucky (Filing No. 61, Exhibits 83-85), containing a statement relative to Kentucky's boundary as being "the low-water mark on the far side," was objected to by Illinois on the ground of relevancy and for containing hearsay and improper opinion testimony. I would agree. (See Fed. Rules of Evidence 801). The same ruling would apply to all newspaper articles submitted by Kentucky which purport to discuss the location of Kentucky's Ohio River boundary.

/



Evidence of taxation of ferries (Filing No. 61, Exhibits 94-101), railroad bridges (Filing No. 61, Exhibits 102-104), fuel (Filing No. 61, Exhibits 105-106), taxation of food and pleasure/commercial vessels (Filing No. 61, Exhibits 107-110) and Corporate Income Tax (Filing No. 61, Exhibits 111-113) are all irrelevant to the present controversy.

The evidence presented by Kentucky in mineral leases granted by three Kentucky counties to private companies or individuals to dredge the river bottom adds nothing to the determination of the location of the Ohio River boundary of those counties, as the leases in question were necessarily limited to the territory "within the boundaries" of the lessor counties. (See Filing No. 61, Exhibits 117, 118, 119).

The majority of the exhibits submitted by Kentucky pertaining to fishing and musseling licenses (Filing No. 61, Exhibits 122-139) deal with special licenses issued by Kentucky for sport and commercial fishing on the Ohio River only and not general licenses which would have been good for any waters of the Commonwealth of Kentucky. While Illinois does not dispute the existence of these licenses or the fact that they have been purchased by Illinois residents, as well as residents of Indiana and Ohio, Illinois denies that the existence of these licenses generally denotes an exercise of exclusive jurisdiction over the Ohio River by Kentucky. In support of this position Illinois once again points out that it does not claim the entire Ohio River to be within its jurisdiction, but on the contrary, acknowledges that the majority of the river is within the Commonwealth of Kentucky. Thus, no matter where the 1792 low-water mark is located at any point on the river, the area south of that mark is within the boundary of Kentucky and a

fishing license would be required for fishing south of that line. Thus, Illinois argues, given the current absence of a clear understanding of the exact location of the boundary, a prudent resident of Illinois would acquire a Kentucky Ohio River license along with his own State's license in order to be sure he was licensed to fish the entire breadth of the river. I would agree that this evidence does not support Kentucky's claim of exclusive exercise of jurisdiction over the Ohio River.

Filing 61, Exhibits 140-148, relate to a policy suggested by Kentucky officials that water fowl shot from a place in the State of Ohio north of the Ohio River low-water mark could be retrieved from the waters of the river south of the low-water mark in Kentucky. This policy was objected to by a U.S. game agent in a 1954 memo, containing a number of hearsay statements concerning the location of Kentucky's river boundary with the State of Ohio. Since the boundary has since been determined by the U.S. Supreme Court in a manner contrary to the game agent's suggestion, the relevance of this document is certainly questionable and hardly applicable to the State of Illinois.

The next category of exhibits (Filing No. 61, Exhibits 149-155) submitted by Kentucky concerns boats and boating. These exhibits (149-153) list various provisions of Kentucky's statutes authorizing it to regulate and license various aspects of boating on the waters of the Commonwealth, but provide exceptions for watercraft licensed in another state, such as Illinois, provided the boat does not remain within Kentucky for a period in excess of 60 consecutive days. In view of the fact that Illinois has a comparable statutory provision, (See Filing No. 55, Exhibit 60), affecting Kentucky boaters, this

evidence does not provide further evidence of Kentucky's exercise of jurisdiction and control over the entire Ohio River.

Exhibit 154 is a copy of a decision of the Kentucky Court of Appeals (*Robertson v. Commonwealth*, 101 Ky. 285 [1987]) involving a statute for licensing shanty boats, which is comparable to an Illinois statute (Filing No. 55, Exhibit 22) and prosecutions thereunder (Exhibits 23-28). Since the prosecution in the *Robertson* case involved a shanty boat tied to the Kentucky shore of the river, and Illinois makes no claim of jurisdiction to that part of the Ohio River, this evidence offers no support for Kentucky's claim of jurisdiction over the entire river. The same would hold true of Exhibit 155 consisting of two Kentucky boating accident reports, since the reports do not disclose where the accidents took place in relation to the Illinois shore.

Based on all the evidence presented, I conclude that Kentucky has failed to carry its burden of proof to demonstrate, by a preponderance of the evidence, that it has continuously asserted its boundary with Illinois to be the low-water mark on the northerly side of the Ohio River as it exists from time to time, and that Illinois has acquiesced therein.

Kentucky has also asserted laches as a separate defense in its answer filed herein. The Court has recognized for more than 150 years that a boundary dispute between two states is essentially a dispute between two sovereigns, and as such, the doctrine of laches is inapplicable. (*Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 464 [1838]; see also, *United States v. Summerlin*, 310 U.S. 414, 416 [1940]). In none of the many boundary cases it has considered through the years, has the Supreme Court based its decision on a

finding of laches. Instead, it has addressed the equitable considerations inherent in the defense of laches in terms of acquiescence or prescription. (See *Indiana v. Kentucky*, 136 U.S. 479 [1890]).

Kentucky's Fifth Defense seeks to establish its boundary with Illinois based on "the principles of riparian boundaries, including accretion, erosion and avulsion." The principles of erosion, accretion and avulsion are totally inapplicable to Kentucky's Ohio River boundary. This claim by Kentucky was previously raised in *Ohio v. Kentucky*, 444 U.S. 335 (1980) and rejected by the Court, where the Court stated that:

"It should be clear that the Ohio River between Kentucky and Ohio, or, indeed, between Kentucky and Indiana, is not the usual river boundary between States. It is not like the Missouri River between Iowa and Nebraska, (citations omitted) or the Mississippi River between Arkansas and Mississippi. (Citations omitted.) In these customary situations the well-recognized and accepted rules of accretion and avulsion attendant upon a wandering river have full application.

A river boundary situation, however, depending on historical factors, may well differ from the customary situation. \*\*\* And in the Kentucky-Ohio and Kentucky-Indiana boundary situation, it is indeed different." 444 U.S. at 337.

The Court's rejection of Kentucky's argument for the application of accretion, erosion and avulsion in *Ohio v. Kentucky* should be equally applicable here.

## C.

**Has the construction of dams on the Ohio River between Illinois and Kentucky permanently raised the level of the river above its level in 1792, and, as a result the present low-water mark on the Illinois side of the river is farther north than it was in 1792?**

In its complaint, Illinois alleged that the construction of dams on the Ohio River between Illinois and Kentucky has permanently raised the level of the river above its level in 1792 and as a result the present low-water mark on the Illinois side of the river is farther north than it was in 1792 (Illinois Complaint, paragraphs XII and XIII). Kentucky, in its Answer, denied both paragraphs of the Complaint. In its brief and in its oral argument before the Special Master on January 5, 1990, Kentucky concedes that the effect of the dams was to raise the level of the water and that some changes may have occurred in the shoreline. However, Kentucky does not know what specific changes occurred on the Illinois shoreline of the Ohio River and argues that this matter "will have to be factually determined if need be, at a later date on the basis of the law found to be applicable to this case." (pp. 39-40, Kentucky's Brief).

In its reply brief, Illinois agrees that Kentucky "must be given ample opportunity to examine Mr. Kreisle's work (Filing No. 41 Exhibits 1 and 2 to Illinois' Motion for Summary Judgment) in order to ascertain its accuracy and adherence to the earlier model" but submits that the task of locating the boundary in a surveying or cartographic sense, "should not be undertaken from scratch in this case, as if nothing had gone before. Just as equity requires a finding that Kentucky's boundary with Illinois should be legally defined in the same manner as the former's boundaries



with Indiana and Ohio, it also requires that the same technical methods be used to actually plot that boundary on a map." (p. 22 Illinois' Reply Brief).

In Kentucky's supplemental submission (Filing No. 61, Exhibit 156), made in April 1990, Kentucky filed an affidavit from Dr. Albert Petersen, Jr., a Professor of Geography and Geology at Western Kentucky University in which he states, that after examining historical documents, he concluded that the most accurate depiction of the northern shoreline of the Ohio River was presented by the 1911-14 charts produced by the United States Army Corps of Engineers. He also acknowledges in paragraph 9 of the affidavit that he recognizes the same source as containing the most accurate depiction of the 1792 low-water mark. Dr. Petersen also states that he compared the 1911-14 Corps of Engineers' charts with the northern shoreline of the Ohio River as shown on the United States Geological Survey 7.5 minute quadrangular maps depicting the Ohio River between Kentucky and Illinois, and concludes that his comparison disclosed that "very little shore line change resulted with the construction of the four high locks and dams (Nos. 50, 51, 52 and 53) of the 1920's and 1930's."

In response to this affidavit, Illinois argues that although Dr. Petersen describes his methodology and conclusions, he does not offer his comparative data for examination. For example, page 7 of his affidavit lists an appendix containing the U.S.G.S. quads which are discussed in paragraph 14 of his affidavit, but does not provide copies of those quads, to show the results of Dr. Petersen's comparison, making it impossible to evaluate his conclusion in paragraph 15 that "very little shore line change" has resulted.



Perhaps more importantly, Illinois argues, Dr. Petersen's affidavit seemingly ignores the data represented on the quad sheets themselves. Referring to its submission on this issue (Filing No. 41, Exhibit 1, Affidavit of William E. Kreisle), Illinois maintains that the 22 U.S.G.S. quad sheets showing the Illinois/Kentucky boundary, with one exception, explicitly states that the boundary depicted on those sheets is a representation of the low-water mark as depicted on the 1911-14 Corps of Engineers' charts adopted by Dr. Petersen in his affidavit. The distance from the existing shoreline, as shown on the U.S.G.S. quads to the low-water mark as depicted on the 1911-14 charts is, according to Illinois, quite striking on a number of the examples discussed by Dr. Petersen. In paragraph 14(a) of his affidavit, Dr. Petersen discusses the Repton Ky-Ill quad. This map was submitted by Illinois as Filing No. 44, Exhibit 7, Map 6. The lower, left-hand portion of this map states specifically that the boundary depicted is based on the low-water line taken from the Corps of Engineers' 1911-14 series. As the river enters the upper edge of the map, the low-water mark as depicted is significantly closer, Illinois urges, to the Kentucky shoreline than the Illinois shoreline, and is, in fact, approximately 3000 feet from the Illinois shore.

Similarly, on the Paducah quad, (Filing 44, Exhibit 7, Map 14), the shoreline near Owens Island varies from 1000 feet to approximately 1500 feet from the Illinois shore. Likewise, Illinois contends, there are places on the Joppa quad sheet (Filing 44, Exhibit 7, Map 17) and the Olmstead quad (Filing 44, Exhibit 7, Map 19) where the low-water mark is 1000 feet or more from the Illinois shoreline. Thus, Illinois claims, that no matter what Dr. Petersen's conclusion is regarding the horizontal expansion of the river resulting from the building of

dams, the very maps he uses show graphically the distance from the present shoreline to the 1792 low-water mark as reflected by the 1911-14 Corps of Engineers data.

One final point is raised by Illinois regarding Dr. Petersen's discussion of the effect of the construction of the dams. In paragraph 13 of his affidavit, he discussed his assignment as plotting the shoreline as it existed before the construction of a series of "modern" high lift dams during the post World War II period. In paragraph 15, in stating his conclusion, Dr. Petersen once again discusses the "four high locks and dams", identified as 50, 51, 52 and 53. In fact, Illinois points out, materials submitted by it (Filing No. 41) show dams 50, 51, 52 and 53 not to be high lift dams, as they are examples of the original series of low dams constructed in the 1920's and 1930's. The high dams were, as Dr. Petersen's affidavit suggests, constructed following World War II, and the Smithland lock and dam is one of such modern dams. It has replaced dams 50 and 51, which are no longer in existence. (See Filing No. 41, Exhibit 5, pp. 16-17, and Exhibit 6, pp. 23-46.) Thus, it would seem that Dr. Petersen, in reaching his conclusion that there has been "very little shore line change" as a result of dam construction along that part of the Ohio River bordering Illinois and Kentucky, has not taken into account the fact that the Smithland high dam has replaced low dams 50 and 51.

It is the recommendation of the Special Master that if this matter need be determined at a later date on the basis of the law found by the Court to be applicable, that such boundary "as nearly as it can now be ascertained" be determined either:

- (a) by agreement of the parties, or
- (b) by joint survey agreed upon by both parties, or,
- (c) in the absence of such an agreement or survey,

after hearings conducted by the Special Master and the submission by him to the Court of proposed findings and conclusions. (*Ohio v. Kentucky*, 444 U.S. at 589).

## IV.

## RECOMMENDATIONS

Based upon the foregoing factual findings and legal analysis, the Special Master recommends:

(1) That the Supreme Court of the United States determine that the boundary between the State of Illinois and the Commonwealth of Kentucky is the low-water mark on the northerly side of the Ohio River as it existed in the year 1792 and that such boundary is not the low-water mark on the northerly side of the Ohio River as it exists from time to time.

(2) That the Court determine that the record and the law do not support the Commonwealth of Kentucky's affirmative defenses of acquiescence, laches, accretion, erosion and avulsion to sustain Kentucky's claim that its Ohio River boundary with Illinois is the shore line on the Illinois side of the river, as it exists from time to time rather than the 1792 low-water mark.

(3) That the Court determine that the construction of dams on the Ohio River between Illinois and Kentucky permanently raised the level of the river above its level in 1792, and as a result, the present low-water mark on the Illinois side of the river is farther north than it was in 1792.

(4) That such boundary, as nearly as it can now be ascertained, be determined, either

(a) by agreement of the parties,

(b) by joint survey agreed upon by both parties,

or

(c) in the absence of such an agreement or survey, after hearings conducted by the Special Master and the submission by him to the Court of proposed findings and conclusions.

Respectfully submitted,

MATTHEW J. JASEN  
Special Master

June 29, 1990

---

IN THE  
**SUPREME COURT OF THE UNITED STATES**

October Term, 1986

---

STATE OF ILLINOIS, - - - - - Plaintiff,

*versus*

COMMONWEALTH OF KENTUCKY, - - - Defendant.

---

**EXCEPTIONS OF THE  
COMMONWEALTH OF KENTUCKY  
TO THE REPORT OF THE SPECIAL  
MASTER FILED OCTOBER 1, 1990**

---

**FREDERIC J. COWAN**

*Attorney General*

Capitol Building

Frankfort, Kentucky 40601

**JAMES M. RINGO**

*Assistant Attorney General*

Capitol Building

Frankfort, Kentucky 40601

(502) 564-7600

*Counsel of Record*

**RICKIE L. PEARSON**

*Assistant Attorney General*

Capitol Building

Frankfort, Kentucky 40601

*Counsel for Defendant*

---



## TABLE OF CONTENTS

---

	Page
Table of Authorities .....	iv-vi
Exceptions of the Commonwealth of Kentucky to the Report of the Special Master Filed October 1, 1990 .....	1-2
Brief of the Commonwealth of Kentucky in Support of Exceptions to the Report of the Special Master Filed October 1, 1990 .....	3-50
Questions Presented .....	3
Statement of the Case .....	4-5
Historical Background .....	5-6
Summary of Argument .....	6-9
Argument .....	9-50
 I. Prior decisions of this Court establishing the boundary between the Commonwealth of Kentucky and the States of Indiana and Ohio are not controlling precedents on the question of Kentucky's boundary with Illinois .....	     9-16
A. This Court Has Never Considered, In Any Prior Decision, The Factual Issue Of Acquiescence In Determining The Location Of The Boundary Line Along The Entire Length Of Any State Bordering With Kentucky On The Ohio River ...	      9
1. <i>Ohio v. Kentucky</i> (1980) .....	9-10
2. <i>Indiana v. Kentucky</i> .....	10-14
3. 1943 Indiana-Kentucky Compact ....	14-16
4. <i>Henderson Bridge Co. v.</i> <i>City of Henderson</i> .....	 16

B. <i>Handly's Lessee V. Anthony</i> , 18 U.S. (5 Wheat) 174 (1820), formed the basis of Kentucky's long factual exercise of dominion and jurisdiction over the entire Ohio River to the current low- water mark . . . . .	16-17
---	-------

**II. The record supports Kentucky's affirmative defenses of acquiescence, laches, accretion, erosion and avulsion and, thus, sustains Kentucky's claim that its Ohio River boundary with Illinois is the low-water mark on the Illinois side of the river, as it exists from time to time rather than the 1792 low-water mark** 17-18

A. The record supports Kentucky's affirmative defense of acquiescence . . . . .	18-22
1. Oral testimony . . . . .	22-23
2. Drownings in the Ohio River . . . . .	23-25
3. Emergency situations on the river . . . . .	25-26
4. Enforcement of laws on the Ohio River by Kentucky Water Patrol and Department of Fish and Wildlife . . . . .	26-28
5. Bridges . . . . .	28-31
6. Taxation . . . . .	31-34
7. Mineral leases . . . . .	34-35
8. Fishing . . . . .	35-36
9. Waterfowl . . . . .	37
10. Illinois Enabling Act, Illinois Constitutions and Joint Select Committee . . . . .	37-38
11. Geography of Illinois . . . . .	38-39
12. Historical evidence . . . . .	39

B. Evidence submitted by Illinois in opposition to Kentucky's claim . . . . .	40
1. Illinois case decisions . . . . .	40-42
2. Kentucky Attorney General Opinion and Legislative Research Commission Bulletins and <i>Perks v. McCracken</i> . . .	42-43
3. Kentucky OAG 63-847 . . . . .	43-44
4. Kentucky Legislative Research Commission Informational Bulletins No. 81 and 93 . . . . .	44-46
5. <i>Perks v. McCracken</i> . . . . .	46-47
6. <i>Laches</i> . . . . .	47-48
 III. Whether the construction of dams on the Ohio River between Illinois and Kentucky permanently raised the level of the river above its level in 1792, and as a result, the present low-water mark on the Illinois side of the river is farther north than it was in 1792 . . . . .	48
A. Accretion, erosion and avulsion . . . . .	48-49
B. Construction of dams . . . . .	49-50
 IV. Conclusion . . . . .	50

## TABLE OF AUTHORITIES

	Page
<i>Arkansas v. Tennessee</i> , 246 U.S. 158 (1918) . . . . .	22
<i>Beaver v. United States</i> , 350 F.2d 4 (9th Cir. 1965), <i>cert. denied</i> , 383 U.S. 937 (1966) . . . . .	49
<i>Beford-Nugent Co. v. Herndon</i> , 196 Ky. 477, 244 S.W. 908 (1922) . . . . .	19
<i>Berry v. Snyder</i> , 66 Ky. (8 Bush.) 266 (1867) . . . . .	19
<i>Bonelli Cattle Co. v. Arizona</i> , 414 U.S. 313 (1973) . . . . .	50
<i>Church v. Chambers</i> , 33 Ky. (3 Dana.) 274 (1835) . . . . .	19
<i>City of Covington v. State Tax Commission</i> , 231 Ky. 606 21 S.W.2d 1010 (1929) . . . . .	19
<i>Commonwealth v. Henderson Co., Ky.</i> , 371 S.W.2d 27 (1963) . . . . .	19,35
<i>Commonwealth v. Louisville &amp; E. Packet Co.</i> , 117 Ky. 936, 80 S.W. 154 (1904) . . . . .	19
<i>Conn. Light and Power Co. v. Federal Power Comm'n</i> , 557 F2d 349 (1977) . . . . .	39
<i>County of St. Clair v. Lovington</i> , 90 U.S. (23 Wall.) 46 (1874) . . . . .	49
<i>Fleming v. Kenney</i> , 27 Ky. (4 J.J. Marsh) 155 (1830) . . . . .	19
<i>Georgia v. South Carolina</i> , 497 U.S. __ (1990) . . . . .	8,18,21,22,28,48
<i>Handly's Lessee v. Anthony</i> , 18 U.S. (5 Wheat) 374 (1820) . . . . .	7,9,16,17,20,38
<i>Henderson Bridge Co. v. City of Henderson</i> , 173 U.S. 592 (1899) . . . . .	9,16
<i>Indiana v. Kentucky</i> , 136 U.S. 479 (1890) . . . . .	7,9,10-14,15,18,47
<i>Indiana v. Kentucky</i> , 159 U.S. 275 (1895) . . . . .	13
<i>Indiana v. Kentucky</i> , 163 U.S. 520 (1896) . . . . .	13
<i>Indiana v. Kentucky</i> , 167 U.S. 270 (1897) . . . . .	10,13
<i>Joyce-Watkins Co. v. Industrial Commission</i> , 325 Ill. 378, 156 N.E. 346 (1927) . . . . .	40

<i>Louisiana v. Mississippi</i> , 202 U.S. 1 (1906) . . . . .	
<i>Louisville Bridge Co. v. City of Louisville</i> , 81 Ky. 189, 5 Ky. L.R. 16 (1833) . . . . .	
<i>Louisville Sand &amp; Gravel Co. v. Ralston</i> , Ky., 266 S.W.2d 119 (1954) . . . . .	19,34,35
<i>McFall v. Commonwealth</i> , 59 Ky. (2 Metc.) 394 (1859) . . . .	19
<i>McFarland v. McKnight</i> , 45 Ky. (6 B. Mon.) 500 (1846) . . .	19
<i>Meyler v. Wedding</i> , 107 Ky. 310, 53 S.W. 809 (1899), rev'd on other grounds, 192 U.S. 573 (1899) . . . . .	19
<i>Michigan v. Wisconsin</i> , 270 U.S. 295 (1926) . . . . .	18,19
<i>Missouri v. Kentucky</i> , 78 U.S. (11 Wall.) 395 (1871) . . . . .	11
<i>Montana Power Co. v. Federal Power Commission</i> , 15 F2d 491 (1950) . . . . .	39
<i>New Jersey v. Delaware</i> , 291 U.S. 361 (1933) . . . . .	41
<i>Nicoulin v. O'Brien</i> , 172 Ky. 473, 189 S. W. 724 (1916), aff'd., 248 U.S. 113 (1918) . . . . .	19
<i>Ohio v. Kentucky</i> , 410 U.S. 641 (1973) . . . . .	19,21
<i>Ohio v. Kentucky</i> , 444 U.S. 339 (1980) . . . . .	6,9,10,48
<i>Perks v. McCracken</i> , 169 Ky 590, 184 S.W. 89 (1916) . . .	42,46
<i>People Ex Rel Scott v. Dravo Corporation</i> 10 Ill. App. 3d 944, 295 N.E.2d 284 (1973) . . . . .	40
<i>Pollard's Lessee v. Hagan</i> , 44 U.S. (3 How.) 212 (1845) . . . . .	50
<i>Rhode Island v. Massachusetts</i> , 15 Pet. 233 (1841) . . . . .	21
<i>Rhode Island v. Massachusetts</i> , 4 How. 591 (1846) . . . . .	18
<i>Shannon v. Streckfuss Steamers</i> , 279 Ky. 649, 131 S.W.2d 833 (1939) . . . . .	19
<i>Spalding v. Simms</i> , 61 Ky. (4 Metc.) 285 (1863) . . . . .	19
<i>Union Barge Line Corporation v. Marcum</i> , Ky., 360 S.W.2d 130 (1962) . . . . .	34

**Page**

<i>United States v. Claridge</i> , 416 F2d 933 (9th Cir. 1969), <i>cert. denied</i> , 397 U.S. 961 (1970) . . . . .	50
<i>Vermont v. New Hampshire</i> , 289 U.S. 593 (1933) . . . . .	18,21
<i>Ware v. Hager</i> , 126 Ky. 324, 103 S.W. 283 (1907) . . . . .	19
<i>Willis v. Boyd</i> , 224 Ky. 732, 7 S.W.2d 216 (1928) . . . . .	19

**CONSTITUTIONS**

Constitutions of Illinois 1818, 1848, 1870 . . . . .	8,37,38,41
--	------------

**STATUTES**

1 Laws of the United States 472 (1784) . . . . .	6
1 Laws of the United States 673 (1789) . . . . .	6
1 Stat. (U.S.) 189 (1791) . . . . .	6
3 Stat. (U.S.) 428 (1818) (Illinois Enabling Act) . . . . .	6,37
57 Stat. (U.S.) 248 (1943) . . . . .	15,46
Indiana Acts 1943, Chapter 2 . . . . .	15
Illinois Acts of 1867, and 1859 . . . . .	41
KRS 56.220 . . . . .	34,35
Ky. Acts, 1942, Chapter 116 . . . . .	14,46
1 Ky. Stat. 268 . . . . .	19

**FEDERAL RULES OF EVIDENCE**

Federal Rules of Evidence, Rule 803(2) . . . . .	38,39
--	-------

**MISCELLANEOUS**

Bulletins, Kentucky Legislative Research Commission	
No. 81 . . . . .	42,43-45
No. 93 . . . . .	42,44
Geography of Illinois . . . . .	38
Illinois Joint Select Committee Report . . . . .	37,38
Kentucky OAG 63-847 . . . . .	42-44



No. 106, Original  
IN THE  
**SUPREME COURT OF THE UNITED STATES**  
October Term, 1986

---

STATE OF ILLINOIS, - - - - - Plaintiff,

v.

COMMONWEALTH OF KENTUCKY, - - - Defendant.

---

**EXCEPTIONS OF THE  
COMMONWEALTH OF KENTUCKY  
TO THE REPORT OF THE SPECIAL  
MASTER FILED OCTOBER 1, 1990**

---

Pursuant to the Court's order, the Commonwealth of Kentucky ("Kentucky") excepts to the Report of the Special Master filed October 1, 1990, as follows:

1. Kentucky excepts to the conclusion that prior decisions of this Court control this case, and that the boundary between the State of Illinois and the Commonwealth of Kentucky is the low-water mark on the northerly side of the Ohio River as it existed in the year 1792 and not the low-water mark on the northerly side as it exists from time to time.

2. Kentucky excepts to the conclusion that, based upon all the evidence presented, Kentucky has failed to carry its burden of proof to demonstrate, by a preponderance of the evidence, that it has continuously asserted its boundary with Illinois to be the low-water mark on the northerly side of the Ohio River as it exists from time to time, and that Illinois has acquiesced therein.

3. Kentucky excepts to the conclusion that the doctrine of laches is inapplicable in a boundary dispute between two states.

4. Kentucky excepts to the conclusion that the principles of erosion, accretion and avulsion are totally inapplicable to Kentucky's Ohio River boundary.

5. Kentucky excepts to the conclusion that the construction of dams on the Ohio River between Illinois and Kentucky permanently raised the level of the river above its level in 1792, and as a result, the present low-water mark on the Illinois side of the river is farther north than it was in 1792.

6. Kentucky specifically excepts to Recommendations 1, 2, 3, and 4.

Respectfully submitted,

FREDERIC J. COWAN

*Attorney General*

JAMES M. RINGO

*Assistant Attorney General*

RICKIE L. PEARSON

*Assistant Attorney General*

Capitol Building

Frankfort, Kentucky 40601-3494

Counsel for Defendant

No. 106, Original  
IN THE  
**SUPREME COURT OF THE UNITED STATES**  
October Term, 1986

---

STATE OF ILLINOIS, - - - - - Plaintiff,

v.

COMMONWEALTH OF KENTUCKY, - - - Defendant.

---

**BRIEF OF THE COMMONWEALTH OF KENTUCKY  
IN SUPPORT OF EXCEPTIONS TO THE  
REPORT OF THE SPECIAL MASTER  
FILED OCTOBER 1, 1990**

---

**QUESTIONS PRESENTED**

I. Are prior decisions of this Court establishing the boundary between the Commonwealth of Kentucky and the states of Indiana and Ohio, to be the low-water mark on the northerly side of the Ohio River as it existed in the year 1792, controlling precedents on the question of Kentucky's boundary with Illinois?

II. Does the record support Kentucky's affirmative defenses of acquiescence, laches, accretion, erosion and avulsion to sustain Kentucky's claim that its Ohio River boundary with Illinois is the low-water mark on the Illinois side of the river, as it exists from time to time rather than the 1792 low-water mark?

III. Has the construction of dams on the Ohio River between Illinois and Kentucky permanently raised the level of the river above its level in 1792, and as a result, the present low-water mark on the Illinois side of the river is farther north than it was in 1792?

## STATEMENT OF THE CASE

On July 24, 1986, the State of Illinois sought leave to file an original complaint against the Commonwealth of Kentucky. Illinois alleged, *inter alia* that:

### XV.

The Commonwealth of Kentucky, through the acts and statements of its officials, claims that Kentucky's boundary with Illinois is along the present low-water mark on the northerly shore of the Ohio River, rather than the 1792 low-water mark.

### XVI.

By claiming the present low-water mark as its boundary with Illinois, Kentucky seeks to exercise sovereignty over territory to the north of the 1792 low-water mark, which territory Illinois asserts is within its boundaries.

### XVII.

The assertion of jurisdiction by the Commonwealth of Kentucky over territory north of the 1792 low-water mark is a direct infringement upon the sovereignty of the State of Illinois.

By its prayer for relief in its proposed bill of complaint, Illinois asked this Court to enter an order and decree:

1. Declaring the boundary line between the State of Illinois and the Commonwealth of Kentucky to be the low-water mark on the northerly shore of the Ohio River as it existed in 1792;
2. Perpetually enjoining the Defendant from disturbing in any manner the State of Illinois or its citizens from the peaceful use, and enjoyment of all land, water and jurisdiction within the boundaries of Illinois as established by the Court.

On October 14, 1986 (107 S. Ct. 265) the Court granted Illinois' motion to file an original complaint and on December 15, 1986, Kentucky filed an answer denying that 'the northern boundary of the Commonwealth of Kentucky, as established from the cession of Virginia, the Virginia-Kentucky Compact and decisions of this Court, is the low-water mark on the northerly shore of the Ohio River as it existed in 1792' and raised certain affirmative defenses that the equitable principles of acquiescence and laches operate to place its boundary with Illinois not at the low-water mark as it exists from time to time.

Kentucky also raises by affirmative defense the principles of riparian boundaries, including accretion, erosion and avulsion to apply to its boundary with Illinois, as the low-water mark on the northwestern side of the Ohio River as it exists from time to time.

On March 2, 1987, the Court appointed the Honorable Robert Van Pelt, Senior Judge of the United States District Court for the District of Nebraska as Special Master in this case.

By order, dated June 27, 1988, the Court appointed the undersigned, Matthew J. Jasen, to succeed Judge Van Pelt, who died April 27, 1988.

On October 1, 1990, the Special Master filed his Report with this Court. In the Report, the Special Master concluded that Kentucky had not proven its affirmative defenses by a preponderance of the evidence and made recommendations to this Court.

## **HISTORICAL BACKGROUND**

The Commonwealth of Kentucky was carved out of what was the original Commonwealth of Virginia. At the time of the Revolutionary War, Virginia owned or claimed all of the land which comprises Kentucky as well as the land northwest of the Ohio River, including what is now Illinois. In 1784 Virginia executed a deed of cession, known as the Virginia cession, which ceded to the United States all of its lands northwest of the Ohio

River. 1 The Laws of the U.S., 472 (1784). It is agreed that Virginia retained all of the Ohio River through its northerly low-water mark as well as all of what now is Kentucky. On December 18, 1789, the General Assembly of Virginia voted to transform the then District of Kentucky into an independent state. 1 Laws of the U.S., 673 (1789). Congress thereupon admitted Kentucky to the Union on June 1, 1792, by an act adopted February 4, 1791. 1 Stat. (U.S.) 189 (1791). That act set the boundaries of Kentucky as they existed on December 18, 1789. Thus, the boundary was the low-water mark on the northerly side of the Ohio River.

Pursuant to the Illinois Enabling Act, enacted by Congress on April 18, 1818, the State of Illinois was formed from part of the territory ceded by Virginia. According to the terms of the Illinois Enabling Act, Illinois' boundary with Kentucky was to run along the "north-western shore" of the Ohio River. 3 Stat. (U.S.) 428 (1818).

### SUMMARY OF ARGUMENT

The Report erroneously concludes that prior decisions of this Court, principally *Ohio v. Kentucky*, 444 U.S. 335 (1980), which determined that Kentucky's boundary with Ohio and Indiana is the 1792 northerly low-water mark, is controlling precedent on the question of Kentucky's boundary with Illinois.

If this case were before the Court, simply *as a matter of law*, *Ohio v. Kentucky* would be controlling precedent.

However, this case is before the Court on the *factual issue* of acquiescence which Kentucky has raised as an affirmative defense to Illinois' claim that its boundary is the 1792 low-water mark.

None of the prior decisions cited by the Special Master, including *Ohio v. Kentucky* (1980), considered acquiescence in determining the boundary line *along the entire length* of any state bordering with Kentucky on the Ohio River.



*Ohio v. Kentucky* (1980), held that Kentucky boundary with Ohio was the northerly 1792 low-water mark, as a matter of law. The factual issue of acquiescence was not considered.

*Indiana v. Kentucky*, did consider the issue of acquiescence, but only as it pertained to which state owned Green River Island. The location of the *entire* 350 mile *boundary* between the two states was not in issue.

*Handly's Lessee v. Anthony* construed Virginia's Cession of 1784 and definitively determined that Kentucky's boundary with Indiana was the northerly low-water mark. The Court in *Handly* stated:

. . . The states, then, are to have the river itself, wherever that may be, for their boundary.

Kentucky submits that *Handly* is the basis for Kentucky's historical exercise of dominion and jurisdiction over the entire river to the current low-water mark on the Illinois shoreline and Illinois' historical acquiescence to that right and authority.

The Report erred in concluding Kentucky failed to prove its affirmative defense of acquiescence.

Acquiescence requires two things:

1. The exercise by one state of dominion and jurisdiction over the territory, and

2. The long acquiescence by the other state in this exercise of dominion, particularly when coupled with a long delay by the acquiescing state in bringing an action to oppose that claim of title.

Kentucky has always exercised sovereignty and jurisdiction over the Ohio River to the current northerly low-water mark on the Illinois shore.

An 1810 Kentucky statute set the boundary of each Ohio River county bordering the river at the north side of the river. Since then, Kentucky's highest Court has always recognized Kentucky's sovereignty over the river to the northerly low-water mark or shore.

Kentucky's law enforcement officials enforce Kentucky's boating, fishing and hunting laws up to the Illinois shoreline. Illinois in its Brief In Support of its Complaint cites this assertion of jurisdiction by Kentucky to the Illinois shoreline as a basis for its Complaint.

Coroners from both states testified that if a body is in the water, Kentucky would exercise jurisdiction; if it is on the Illinois shore, Illinois took the body.

Kentucky has also asserted jurisdiction through taxation of barges and structures on the river, granting of mineral leases, and requiring Illinois residents fishing in the Ohio River to have a special Ohio River sport fishing license or commercial fishing license.

Illinois, since 1818, has acquiesced to Kentucky's possession and dominion over the river and waited *168 years* to bring any proceeding to this Court to claim either that the boundary is the 1792 low-water mark or to enjoin Kentucky's exercise of jurisdiction to its shoreline. The Report fails to consider this single most important and *uncontroverted fact* in the case. Moreover, Illinois performs no law enforcement functions on the river south of its shoreline, i.e., fishing, hunting or boating.

*Inaction alone* may constitute acquiescence when it continues for a sufficiently long period. *Georgia v. South Carolina*. One hundred sixty-eight years is sufficiently long.

Illinois has also acquiesced to Kentucky's exercise of jurisdiction to its shoreline through actions of its public officials, bridge agreements and its Constitutions of 1818, 1848 and 1870.

The mutual understanding by both states is that the current low-water mark or shoreline serves, in day-to-day practice, as the boundary. This reflects the *status quo* and a practical location of a common boundary. Acquiescence may be used to confirm the *status quo*.

Finally, the Report's discussion on whether the Dams have permanently raised the level of the river is *premature* as the issue is not before the Court. This issue will have to be factually determined, if need be, at a later date on the basis of the law found to be applicable to the case.

## ARGUMENT

### I.

**PRIOR DECISIONS OF THIS COURT ESTABLISHING THE BOUNDARY BETWEEN THE COMMONWEALTH OF KENTUCKY AND THE STATES OF INDIANA AND OHIO ARE NOT CONTROLLING PRECEDENTS ON THE QUESTION OF KENTUCKY'S BOUNDARY WITH ILLINOIS?**

#### A.

**This Court Has Never Considered, In Any Prior Decision, The Factual Issue Of Acquiescence In Determining The Location Of The Boundary Line Along The Entire Length Of Any State Bordering With Kentucky On The Ohio River.**

The Special Master's Report erroneously concludes that prior decisions of this Court which established the boundary between Kentucky and the States of Ohio and Indiana are controlling precedents on the question of Kentucky's boundary with Illinois. In support of this conclusion, the Report cites *Handly's Lessee v. Anthony*, 18 U.S. (5 Wheat.) 374 (1820); *Indiana v. Kentucky*, 136 U.S. 479 (1890); *Henderson Bridge Co. v. City of Henderson*, 173 U.S. 592 (1899); and *Ohio v. Kentucky*, 444 U.S. 335 (1980).

#### (1) *OHIO V. KENTUCKY* (1980)

Kentucky concedes that if this case were before the Court simply as a *matter of law*, *Ohio v. Kentucky*, 444 U.S. 335 (1980) would be controlling precedent. However, such is not the case.

This boundary case is before the Court on the factual issue

of acquiescence which Kentucky has raised as an affirmative defense on the question of its boundary with Illinois. An issue which was not before the Court in *Ohio v. Kentucky* (1980).

The present case differs from these prior decisions cited by the Report in that *none* of them dealt with or considered the factual issue of acquiescence as it pertained to the location of the boundary line *along the entire length* of any State bordering with Kentucky on the Ohio River.

## (2) *INDIANA V. KENTUCKY*

*Indiana v. Kentucky*, 136 U.S. 479 (1890) did consider the issue of acquiescence, but only as it pertained to establishing the ownership of an island. The dispute in that case was not over, nor did it involve, the location of the entire boundary line between Kentucky and Indiana along the Ohio River (a distance of approximately 350 miles). The dispute was over which State owned Green River Island, a tract of land nearly five miles in length and over half a mile in width, embracing about 2,000 acres. The Court held that Kentucky owned the island and resulted in the location *and marking with monuments* of less than 5 miles of the land boundary line separating Kentucky from the mainland of Indiana along the filled channel. *Indiana v. Kentucky*, 167 U.S. 270 (1897), (Report of Commissioners permanently marking 1896 survey line approved by the Court).

Because a proper understanding of what *Indiana v. Kentucky* did and did not do is critical to its case, Kentucky submits that an extensive discussion of that case is necessary here.

Green River Island at one time had been a true island separated from the Indiana mainland by a channel of the Ohio River. The river gradually changed its course so that the channel north of the island filled up and the island became and was attached to the Indiana mainland when Indiana became a State in 1816 and at the time of the litigation in 1890.

In deciding which State owned the island, the Court applied

two principles of law.

The first principle, *a legal one*, was that if an island is within a State's jurisdiction when it becomes a State, no subsequent change in the river can divest it of its ownership of that island. The Court cited *Missouri v. Kentucky*, 78 U.S. 395 (1871) in which this principle was applied to resolve a dispute between Missouri and Kentucky over the ownership of Wolf Island in the Mississippi River. 136 U.S. at 508.

The second principle, *a factual one*, was the doctrine of acquiescence. That is, the long acquiescence by one State in the exercise by another State of dominion and jurisdiction over the territory, particularly when coupled with a long delay or lapse of time in which the acquiescing State fails to oppose that claim of title or bring any judicial proceeding to challenge the possession of the territory, is conclusive of the possessing State's title and rightful authority. 136 U.S. at 510.

In framing the determinative issue in the case, the Court stated:

The question then becomes one of fact, did the waters of the Ohio pass between Green River Island and the mainland of Indiana when Kentucky became a State and her boundaries were established?

136 U.S. at 509.

Addressing this question, the Court reviewed the evidence of both States which consisted of speculations of geologists, recollections of witnesses and a great number of transactions introduced by Kentucky which proceeded on the assumption that the tract was within the jurisdiction of Kentucky, such as an 1810 Kentucky statute declaring her sovereignty over the Ohio River; two adjudications, one by the United States Circuit Court and one by a Circuit Court of Kentucky that the island was within the jurisdiction of Kentucky; and that between 1818 and 1877 numerous grants of parcels of land on the island were made by

Kentucky and taxes assessed.

The Court concluded from the evidence that when Kentucky became a State the island was separated from the mainland of Indiana by a channel of the Ohio River.

The Court then applied the doctrine of acquiescence and concluded that Indiana's long acquiescence to Kentucky's exercise of jurisdiction over the island coupled with the fact that Indiana had waited over seventy years after becoming a State before asserting a claim to the island was conclusive of Kentucky's right to the island.

In applying this doctrine, the Court stated:

But above all the evidence of former transactions and of ancient witnesses, and of geological speculations, there are some uncontroverted facts in the case which lead our judgment irresistibly to a conclusion in favor of the claim of Kentucky. *It was over seventy years after Indiana became a State before this suit was commenced, and during all this period she never asserted any claim by legal proceedings to the tract in question. She states in her bill that all the time since her admission Kentucky has claimed the Green River Island to be within her limits and has asserted and exercised jurisdiction over it, and thus excluded Indiana therefrom, in defiance of her authority and contrary to her rights. Why then did she delay to assert by proper proceedings her claim to the premises? On the day she became a State her right to Green River Island, if she ever had any, was as perfect and complete as it ever could be. On that day, according to the allegations of her bill of complaint, Kentucky was claiming and exercising, and has done so ever since, the rights of sovereignty both as to soil and jurisdiction over the land.*

\* \* \* \*



*This long acquiescence in the exercise by Kentucky of dominion and jurisdiction over the island is more potential than the recollections of all the witnesses produced on either side. Such acquiescence in the assertion of authority by the State of Kentucky, such omission to take any steps to assert her present claim by the State of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to be overcome, except by the clearest and most unquestioned proof. It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority.*

136 U.S. at 509, 510. [Emphasis added.]

Thus, the Court resolved the dispute over the ownership of Green River Island in favor of Kentucky. As a result, the Court appointed three commissioners to ascertain and run the boundary line between the States north of the tract known as Green River Island. 136 U.S. 518, 519; *Indiana v. Kentucky*, 159 U.S. 275 (1895), (appointment of commissioners); *Indiana v. Kentucky*, 163 U.S. 520 (1896), (Report of Commissioners); *Indiana v. Kentucky*, 167 U.S. 270 (1897), (Report of Commissioners permanently marking 1896 survey line approved by the court).

Kentucky filed an exception with the Commissioners on their Report which marked the line established by *Indiana v. Kentucky*, (163 U.S. at 528). The exception requested that the line established by the Commissioners be extended "*until it intersects the present low water line of the Ohio River both at the upper and lower ends. In other words that you run at each end to the points where low water mark in 1792 coincides with low water mark at the present time.*" 163 U.S. at 528. [Emphasis added.]

The commissioners decided they were not authorized to lay

any line beyond the upper and lower limits of Green River Island as it existed in 1792. 163 U.S. at 524.

The Court ordered that the exception to the Report of the commissioners be overruled and the surveyed boundary line, as described and delineated in the Report, be permanently marked as recommended in the Report. 163 U.S. at 536, 537.

The Court then further ordered:

And it is further ordered, adjudged, and decreed that this decree is without prejudice to further proceedings as either of the parties may be advised for the determination of such part of the boundary line between the States as may not have been settled by this decree under the pleadings in this case.

163 U.S. at 537. Kentucky submits this supports its argument that *Indiana v. Kentucky* decided only the location of Kentucky's land boundary north of Green River Island. Accordingly, only the land boundary in the filled channel was marked with stone monuments and iron posts.

The importance of the location of the 1792 low-water mark was to determine if the tract of land (Green River Island) was a true island in the Ohio River when Kentucky was admitted to the Union.

Moreover, the 1943 interstate compact between Indiana and Kentucky is further evidence that *Indiana v. Kentucky* did not decide the entire boundary line between the states.

### (3) 1943 INDIANA-KENTUCKY COMPACT

In March, 1942, the General Assembly of Kentucky adopted an act to establish the boundary line between the State of Indiana and the Commonwealth of Kentucky by agreement, 1942 Ky. Acts, Chapter 116. (Filing No. 12(b), Kentucky Legislative Research Commission, Informational Bulletin No. 81, pp. 25, 26.) The act recited that neither of the terminal points of the boundary line

described in the Green River Island case, *Indiana v. Kentucky*, 163 U.S. 520 (1896), "reached the *low water mark of the right side of the Ohio River, forming the remainder of the boundary line between said States,* " that the Governors of the two states "have appointed Commissioners to study said question for the purpose of ascertaining the true and legal boundary line thus in dispute," and that "said Commissioners have agreed upon the true and legal boundary line." [Emphasis added.] The act then provided that upon "enactment of a similar and reciprocal law by the State of Indiana and the approval and consent of the Congress of the United States of America to the compact thereby effected, the boundary line between the State of Indiana and the Commonwealth of Kentucky shall be as follows". The act then described the two lines necessary to connect the two terminal points to the "low water mark" and completed the description of the Indiana-Kentucky boundary upstream with the language "*to the low water mark on the right side of the Ohio River and thence upstream* at low water mark on the right side of said River, " and completed the description of the Indiana-Kentucky boundary downstream with the language "*to the low water mark on the right side of the Ohio River and thence downstream* with said low water mark on the right side of said River." The Indiana General Assembly passed a like act. 1943 Ind. Acts, Ch. 2. The Congress of the United States then passed a joint resolution in 1943 reciting the actions of the Governors and commissioners and the passage of the Kentucky Act in 1942 and the Indiana Act in 1943, and approved the boundary line as described in the acts. 57 Stat. 248 (1943). (Filing No. 12(b), Kentucky Legislative Research Commission, Informational Bulletin No. 81, pp. 26, 27.)

No reference to any time or specific location concerning the low water mark upstream or the low water mark downstream was made in these legislative acts of the States or joint resolution of Congress.

For these reasons, Kentucky submits *Indiana v. Kentucky* did

not decide the *entire boundary* between the two states and is not controlling precedent here.

(4) *HENDERSON BRIDGE CO. V. CITY OF HENDERSON*

*Henderson Bridge Co. v. City of Henderson*, 173 U.S. 592 (1899), involved the constitutionality of the city's authority to tax a bridge over the Ohio River. The exact location of the northern low water mark was not at issue. Thus, *Henderson Bridge v. City of Henderson* is not a controlling precedent on the question of Kentucky's boundary with Illinois.

B.

*Handly's Lessee V. Anthony*, 18 U.S. (5 Wheat) 174 (1820), formed the basis of Kentucky's long factual exercise of dominion and jurisdiction over the entire Ohio River to the current low-water mark.

In construing Virginia's Cession of 1784, the Handly Court stated:

In pursuing this inquiry, we must recollect that it is not the bank of the river, but the river itself, at which the cession of Virginia commences. She conveys to Congress all her right to the territory 'situate, lying, and being, to the north-west of the river Ohio.' And this territory, according to express stipulation, is to be laid off into independent states. *These states, then, are to have the river itself, wherever that may be for their boundary.* This is a *natural boundary*, and in establishing it, Virginia must have had in view the *convenience of the future population of the country.*

*Id.* at 379.

\* \* \* \*

... Wherever the river is a boundary between states, it is the main, the permanent river, which constitutes that boundary; and the mind will find itself embarrassed with

insurmountable difficulty in attempting to draw any other line than *the low-water mark*.

*Id.* at 380, 381. [Emphasis added.]

Thus, this Court, in 1820, ruled that Kentucky's northerly boundary extends to the low-water mark on the northern side of the Ohio River.

If there had been doubts as to the extent of Kentucky's jurisdiction on the Ohio River, such were removed by *Handly*. Kentucky submits that since *Handly* it has openly and continuously asserted jurisdiction over the entire river to the northern low-water mark on Illinois' shoreline ever since.

This explains why, in all subsequent cases concerning the boundary of Kentucky on the Ohio River, the courts always harken to *Handly*.

For this reason, *Handly* is the basis for Kentucky's *historical exercise* of dominion and jurisdiction over the river and Illinois' *historical acquiescence* to that right and authority.

Kentucky submits that when Virginia retained the Ohio River as the northerly boundary of the District of Kentucky, she recognized that the river, being a great natural phenomenon, would change its character and bounds from time to time. Based upon this recognition, it is clear that Virginia intended this boundary to be a natural moving and continuing line situated, for public convenience and avoidance of controversy, at the current low-water mark on the northern shore, wherever that might be.

## II.

**THE RECORD SUPPORTS KENTUCKY'S AFFIRMATIVE DEFENSES OF ACQUIESCENCE, LACHES, ACCRETION, EROSION AND AVULSION AND, THUS, SUSTAINS KENTUCKY'S CLAIM THAT ITS OHIO RIVER BOUNDARY WITH ILLINOIS IS THE LOW-WATER MARK ON THE ILLINOIS SIDE OF THE RIVER, AS IT EXISTS**

## FROM TIME TO TIME RATHER THAN THE 1792 LOW-WATER MARK?

### A.

#### **The Record Supports Kentucky's Affirmative Defense of Acquiescence.**

The Report is in error in concluding that Kentucky has failed to establish its affirmative defense of acquiescence. Kentucky takes exception to this conclusion.

The Report, in setting the framework for review, correctly places the burden of proof in establishing the affirmative defense of acquiescence on the party asserting it, Kentucky, and that the defense must be demonstrated by a preponderance of the evidence. Report at p. 11.

However, in setting forth and weighing the evidence presented in this case, the Report errs by failing to consider certain uncontroverted evidence presented by Kentucky that establishes its possession and exercise of sovereignty and jurisdiction over the Ohio River to the Illinois shoreline.

Moreover, the Report completely ignores the single most important fact in this case. That is, *Illinois waited for 168 years before it brought an action in this Court to claim the 1792 low-water mark or to contest the boundary to which Kentucky exercises jurisdiction and dominion.*

The doctrine of acquiescence has long been recognized and applied by this Court in resolving boundary disputes between States. See, e.g., *Georgia v. South Carolina*, 497 U.S. \_\_\_ (1990); *Michigan v. Wisconsin*, 270 U.S. 295, 308 (1926); *Vermont v. New Hampshire*, 289 U.S. 593, 613 (1933); *Louisiana v. Mississippi*, 201 U.S. , 53 (1906); *Indiana v. Kentucky*, 136 U.S. 479, 509, 510, 518 (1890); *Rhode Island v. Massachusetts*, 4 How. 591, 638-639 (1846).

The Court has stated the rule as follows:



The rule, long-settled and never doubted by this court, is that long acquiescence by one state in the possession of territory by another and in the exercise of sovereignty and dominion over it is conclusive of the latter's title and rightful authority.

*Michigan v. Wisconsin*, 270 U.S. at 308.

Kentucky submits that it has openly and continuously exercised sovereignty and jurisdiction over the entire Ohio River to the current northerly low-water mark on Illinois' shoreline since it became a State in 1792.

Kentucky has always asserted dominion to the prevailing low-water mark on the northerly side. The first recorded history of its assertions is the 1810 legislative enactment referred to in *Ohio v. Kentucky*, 410 U.S. 641, 650 (1973), in which the Kentucky General Assembly enacted a statute that sets the boundary of each county bordering the Ohio River at the northwest side of that river and placed the bed of the river and the islands located in it in each such county. Vol. 1, Stat. of Kentucky, p. 268. This statute has never been repealed.

Since then, in an unbroken line of decisions, Kentucky's highest court has recognized Kentucky's sovereignty over the river to the northerly low-water mark or shore. *Commonwealth v. Henderson Co.*, 371 S.W.2d 27 (Ky. 1963); *Louisville Sand & Gravel Co. v. Ralston*, 266 S.W.2d 119 (Ky. 1954); *Shannon v. Streckfuss Steamers*, 279 Ky. 649, 131 S.W.2d 833 (1939); *City of Covington v. State Tax Commission*, 231 Ky. 606 21 S.W.2d 1010 (1929); *Willis v. Boyd*, 224 Ky. 732, 7 S.W.2d 216 (1928); *Beford-Nugent Co. v. Herndon*, 196 Ky. 477, 244 S.W. 908 (1922); *Nicoulin v. O'Brien*, 172 Ky. 473, 189 S. W. 724 (1916), *aff'd.*, 248 U.S. 113 (1918); *Ware v. Hager*, 126 Ky. 324, 103 S.W. 283 (1907); *Commonwealth v. Louisville & E. Packet Co.*, 117 Ky. 936, 80 S.W. 154 (1904); *Meyler v. Wedding*, 107 Ky. 310, 53 S.W. 809 (1899), *rev'd on other grounds*, 192 U.S. 573 (1899);

*Louisville Bridge Co. v. City of Louisville*, 81 Ky. 189, 5 Ky. L.R. 16 (1833); *Berry v. Snyder*, 66 Ky. (8 Bush.) 266 (1867); *Spalding v. Simms*, 61 Ky. (4 Metc.) 285 (1863); *McFall v. Commonwealth*, 59 Ky. (2 Metc.) 394 (1859); *McFarland v. McKnight*, 45 Ky. (6 B. Mon.) 500 (1846); *Church v. Chambers*, 33 Ky. (3 Dana.) 274 (1835); *Fleming v. Kenney*, 27 Ky. (4 J.J. Marsh) 155 (1830).

When these judicial assertions of Kentucky's jurisdiction and sovereignty over the Ohio River are considered along with the evidence of Kentucky's long and undisturbed assertion of jurisdiction to the Illinois shore and Illinois' long acquiescence to that possession, the general term "northerly low water mark" necessarily must mean the current low-water mark at the time the issue of the boundary was in question.

The Court in *Handly* recognized that Kentucky's boundary with its northern neighbors on the Ohio River was a great natural boundary, established in general terms, with a view toward public convenience and the avoidance of controversy, at the water's edge.

Nothing could be more consistent with this holding than the current low-water mark.

Illinois, since its creation in 1818, has acquiesced to Kentucky's possession and dominion over the river and has failed to take any action or bring any judicial proceeding prior to the instant action, to claim that the boundary is the 1792 low-water mark or to enjoin Kentucky from exercising sovereignty over territory north of the 1792 low-water mark, as a direct infringement upon the sovereignty of Illinois.

In its Brief In Support Of Motion For Leave To File Complaint, Illinois asserts in its *Statement*, at page 12, the following facts in support of its charge that Kentucky has infringed upon the sovereignty of the State of Illinois:

The Commonwealth of Kentucky by the actions of its officials and employees has sought to assert the *present low-water mark as its boundary with Illinois*. For

example, Kentucky has attempted to require all Illinois residents who desire to fish in the Ohio river to obtain Kentucky fishing licenses, *regardless of whether they are fishing to the north or south of the 1792 low-water mark*. Further, Kentucky wardens have ignored even the present low-water mark by seeking to enforce the hunting and fishing laws of Kentucky *up to the northerly shore*, regardless of the river's level.

Similarly, Kentucky has attempted to require all Illinois residents who own boats docked *along the northerly shore* of the Ohio river to have Kentucky boating licenses, *without reference to the location of such boats vis-a-vis the 1792 low-water mark*.

*Kentucky by claiming and asserting jurisdiction up to the present low-water mark and beyond* has sought to divest Illinois of territory properly belonging within its boundaries. Furthermore, Kentucky's attempted exercise of police, regulatory and taxing powers *over the area to the north of the 1792 low-water mark* is a direct denial of the sovereign rights of the State of Illinois over its own territory.

[Emphasis added.]

Moreover, this court has held that *inaction alone* may constitute acquiescence when it continues for a sufficiently long period. See *Georgia v. South Carolina*, 497 U.S. \_\_ (1990); *Rhode Island v. Massachusetts*, 15 Pet. 233, 2744 (1841); *Vermont v. New Hampshire*, 289 U.S. 593, 616 (1933).

Illinois waited 168 years, since it became a state, before it brought an action to this Court. Kentucky submits that this alone is a sufficiently long period to constitute acquiescence. Furthermore, Illinois has not alleged or proved that its failure to assert its claim for 168 years is due to any excusable neglect. See *Ohio v. Kentucky*, 410 U.S. 641, 650 (1973).

However, Kentucky submits there is more than this inaction alone to establish its affirmative defense of acquiescence.

To begin, the doctrine of acquiescence may be used only to confirm the current status or *status quo*. *Georgia v. South Carolina*, 497 U.S. \_\_\_ (1990).

The *status quo* in this case is that both states recognize and treat the Illinois shoreline, as the boundary between the two states. Locating and using the 1792 low-water mark would be a *change* from the current situation. Neither state has ever treated the 1792 low-water mark as the boundary line, as neither has ever marked or located that line.

Kentucky submits that for almost 200 years Kentucky has claimed and for 168 years Illinois has acquiesced to the boundary on the river being the current low-water mark or Illinois shoreline. This long acquiescence by Illinois and the mutual understanding by *both* states, that the current low-water mark or Illinois shoreline serves, in day-to-day practice and application, as the boundary. This reflects the *status quo* and a practical location of a common boundary at the current low-water mark or shoreline. See *Arkansas v. Tennessee*, 246 U.S. 158, 172 (1918).

#### (1) ORAL TESTIMONY

The testimonial evidence demonstrates that Kentucky law enforcement officials have always performed their administrative and regulatory functions up to the Illinois shoreline; that Illinois officers and officials have recognized the shoreline as the boundary between the two states; that Illinois has performed no law enforcement on the Ohio River south of its shoreline; that Kentucky coroners exercise jurisdiction and take custody of bodies in the waters of the Ohio River; that Illinois coroners recognize Kentucky jurisdiction in this regard and exercise jurisdiction over a body *only if it is on the Illinois shore*; and that history and custom of the location of the boundary establishes that Kentucky

owns and exercises jurisdiction and sovereignty over the entire river to the Illinois shoreline.

## (2) *DROWNINGS IN THE OHIO RIVER*

In the Report, the Special Master concludes that, "In order for Kentucky to establish support for its position of acquiescence on the part of Illinois, it must be shown that the bodies recovered by Kentucky coroners from the Ohio River were north of the 1792 low-water line, as Illinois acknowledges Kentucky's jurisdiction south of that line." (Report at p. 23). In view of this conclusion, the Report opines that Kentucky's evidence does not show that the bodies handled by the Kentucky coroners took place on the Illinois side of the 1792 low-water mark. (Report at pp. 23-24.) The Report's conclusion in this regard is premised upon a factual predicate that the 1792 low-water line had already been defined, fixed, and was notoriously understood by both states as to its location. Kentucky submits this is hardly the situation. At no time since 1818, when Illinois became a state, has the 1792 low-water mark been located, fixed, plotted, or otherwise established. Moreover, the testimony from coroners of both states, along the river, demonstrates that the 1792 low-water mark was not a consideration when exercising jurisdiction over the bodies of victims who had drowned in the river. Two of Kentucky's coroners (from McCracken and Livingston Counties), testified that if the drowned body is in the river, the Kentucky coroner would exercise jurisdiction over the case (Jerry Beyer Deposition at pp. 15, 19 and Harry Van Smith Deposition at p. 11).

The Report attached considerable weight to the fact that Illinois admitted into evidence 214 drowning reports signed by Illinois coroners. However, the Commonwealth submits these documents do nothing more than show that 214 people drowned in the Ohio River and an Illinois coroner determined the cause of death. The documents do not disclose where and by whom the bodies were recovered and the involvement of Kentucky in



handling the drownings. Moreover, the testimony from several Illinois coroners, along the river, provides significant evidence regarding the practice of recovering drowned bodies in the Ohio River.

For example, when Charles W. Diekroger, the coroner for Massac County, Illinois, finds a body in the Ohio River, he notifies the Kentucky coroner in Paducah, McCracken County, Kentucky (Diekroger Deposition at pp. 5-6). As a result, the Kentucky coroner comes to Illinois, gets the body, and returns it to Kentucky (*Id.* at 6). According to David W. Barkett, the coroner at Alexander County, Illinois, he would exercise jurisdiction over a drowned body if the body is located on Illinois land (Barkett Deposition at pp. 13, 15, 17-18). Consistent with the policy of coroner Barkett, the coroner of Pulaski County, Illinois, Bill E. Atherton, only took jurisdiction over bodies which at the time of his arrival were on Illinois land (Atherton Deposition at pp. 6-10). Even though A. C. Cox, a former coroner for Gallatin County, Illinois, had worked out an agreement with his Kentucky counterpart over drownings in the river, he stated that the present rule is that if a body is in the water, then it goes to Kentucky even though the body is from Illinois (A. C. Cox Deposition at pp. 5-6). Charles A. Cox, the present coroner in Gallatin County, Illinois, subscribed to the same theory as his predecessor by concluding that if the body is in the water, it belongs to Kentucky (Charles A. Cox Deposition at p. 7). When Granville Brownfield, the coroner of Hardin County, Illinois, exercises control over a drowned body, the Kentucky coroner on the opposite side of the river is contacted (Brownfield Deposition at pp. 11-12). Usually when the Kentucky coroner arrives on the Illinois side of the river, the Kentucky coroner gives the Illinois coroner permission to take control of the body (*Id.*).

In view of the testimony given by coroners from both states, the Report simply concludes that the testimony demonstrated informal practical accommodations and these accommodations did



not "constitute acquiescence since they are not based on any concession of right by either side, but rather, [were] brought about by uncertainty by both sides as to the location of the actual boundary." (Report at p. 24.) Because the Report concludes that there was uncertainty about the boundary with respect to coroners exercising control over drowned bodies, Kentucky submits that the Report's previous conclusion is erroneous where it opines that Kentucky's evidence did not show that any of the drownings occurred north of the 1792 low-water mark. In short, no one could show that the bodies were recovered north of the 1792 low-water mark when no one knew exactly where it was located.

### (3) *EMERGENCY SITUATIONS ON THE RIVER*

Kentucky's evidence presents two (2) emergency situations on the river which are typical of Illinois' recognition that Kentucky's boundary is the northwestern shore as it exists from time to time.

During a labor dispute at a coal terminal on the Illinois bank, the United States Coast Guard established a security zone on the river to prevent boats from entering the area (John L. Bailey Deposition at pp. 5-9). Kentucky and Illinois were requested to provide uniformed law enforcement personnel (*Id.* at 8, 10). Illinois agreed and put a trooper on a Coast Guard patrol boat, but the Illinois officer-in-charge stated that Illinois had no authority on the river (*Id.* at 20). The commanding officer of the Illinois troopers also expressed the same view as the officer-in-charge (*Id.* at 20).

The second situation concerned a burning tow boat, *the Bayou Cauba*, located approximately 5 to 10 feet from the Illinois shore (Captain Thomas Robinson Deposition at pp. 6-7). When the Coast Guard arrived on the scene, the Golconda Illinois Volunteer Fire Department was there but they were standing around as the boat was afire (*Id.* at p. 7). The fire fighters were unwilling to get involved for two reasons. One reason was because they felt they did not have the expertise and, two, they indicated that because the

fire was on a tow boat *in the river*, it was the State of Kentucky's problem and not the State of Illinois'; that they had no jurisdiction and they were concerned about their liability if they were to attempt to fight a fire in an area that was not under their jurisdiction (Robinson Deposition at pp. 7, 9).

As a result, the Coast Guard contacted Kentucky Disaster and Emergency personnel who assisted in extinguishing the fire (*Id.* at pp. 7-8).

With respect to the aforementioned evidence, the Special Master's Report concludes that, "I find that their testimony, as a whole, provides very little support for Kentucky's claim of acquiescence, as it reflects the sort of uncertainty and confusion that are incompatible with a finding of acquiescence." (Report at 25.) Kentucky submits that the evidence in question is compatible with Kentucky's claim of acquiescence. Moreover, the evidence demonstrates that Kentucky exercised its jurisdiction over the breadth of the river.

#### (4) *ENFORCEMENT OF LAWS ON THE OHIO RIVER BY KENTUCKY WATER PATROL AND DEPARTMENT OF FISH AND WILDLIFE*

In his Report, the Special Master concludes that the testimony of four (4) witnesses from Kentucky's Water Patrol and Department of Fish and Wildlife did not support Kentucky's position that its boundary with Illinois is the low-water mark on the northerly side of the Ohio River as it exists from time to time. Report at p. 22. The basis for the Report's conclusion is that the testimony of the witnesses could not be accepted in view of "Kentucky's prior repeated official statements claiming the low-water mark as it existed in 1792 when Kentucky became a state . . . ." *Id.*

However, Kentucky submits that the Report ignores valuable testimony which establishes Kentucky's law enforcement activities on the river. Three vital points are made by the testimony. First,

Kentucky water patrol personnel enforce the boating laws to the Illinois shoreline. (Deposition of Steve Owens, Filing No. 23(d) at pp. 5, 19, and Deposition of Claude Storms, Filing No. 23(a) at p. 6.) Secondly, Illinois *does not* patrol or police the Ohio River. According to the testimony of Officers Owens and Storms, they never encountered any Illinois law enforcement officials (state, county or any other jurisdiction) on the Ohio River. (Owens' Deposition, Filing No. 23(d) at p. 5, and Storms' Deposition, Filing No. 23(a) at p. 8.) Third, Illinois has not presented any evidence that it patrols or polices the Ohio River.

The enforcement of Kentucky's hunting and fishing laws by the Department of Fish and Wildlife, is consistent with the enforcement of boating laws. Fish and Wildlife personnel enforce the laws up to the Illinois bank (Deposition of Donan Jenkins, Filing No. 23(b) at p. 4) or when the river overflows, up to the standing pool. (Deposition of David Loveless, Filing No. 23(c) at pp. 7, 15-16.) According to officers Jenkins and Loveless, they have not seen any Illinois fish and wildlife personnel active on the river. (Loveless' Deposition, Filing No. 23(c) at pp. 10-12, and Jenkins Deposition, Filing No. 23(b) at p. 5.)

As previously discussed, Kentucky has always enforced its laws up to the Illinois shore. This enforcement is consistent with the Statement in Illinois' Bill of Complaint where it stated:

The Commonwealth of Kentucky by the actions of its officials and employees has sought to assert *the present low-water mark as its boundary with Illinois*. For example, Kentucky has attempted to require all Illinois residents who desire to fish in the Ohio river to obtain Kentucky fishing licenses, *regardless of whether they are fishing to the north or south of the 1792 low-water mark*. Further, Kentucky wardens have ignored even the present low-water mark by seeking to enforce the hunting and fishing laws of Kentucky *up to the northerly shore*,

*regardless of the river's level.*

Similarly, Kentucky has attempted to require all Illinois residents who own boats docked *along the northerly shore* of the Ohio to have Kentucky boating licenses, *without reference to the location of such boats vis-a-vis the 1792 low-water mark.*

Bill of Complaint at p. 12. [Emphasis added.]

Kentucky did not and does not deny the statement made by Illinois. Kentucky's exercise of its boating laws to the northerly shore does not deny Illinois of its sovereign rights.

Policing or patrolling the river is a consideration to which this court has attached weight when there is a boundary dispute and acquiescence has been raised. See *Georgia v. South Carolina*, 497 U.S. \_\_ (1990). Kentucky submits that its uncontroverted evidence regarding policing the river and Illinois' *failure* to police the river is evidence which the Report ignores. Thus, the aforementioned evidence is indicative of Kentucky's exercise of sovereignty over the breadth of the river. See *Georgia v. South Carolina*, *supra*.

#### (5) BRIDGES

The Report is in error when it concludes that Kentucky's evidence regarding bridges fails to support its claim of acquiescence. It shows that Illinois has agreed and recognized through its state officials and bridge agreements that Kentucky's jurisdiction on the river extends to the low-water mark on the Illinois side; to the Illinois shoreline; to the mean, normal, water elevation on the Illinois shore; and to the north normal pool line.

For example, in September, 1954, H. E. Diers, Assistant Engineer of Maintenance, Illinois Department of Public Works and Buildings wrote a letter to W. J. Crouse, Director, Division of Maintenance, Kentucky Department of Highways concerning the placement of signs on the Ohio River Bridge near Cairo, Illinois marking the Illinois-Kentucky boundary line. (Filing No.12(l),

## Exhibit 6.)

In his letter, he cites two boundary descriptions found in the Illinois State Library in Springfield, Illinois which describe the boundary as the northwestern bank of the Ohio River. He then states:

It is possible that this point can be fixed on the shore line at the mean, normal, water elevation along the Illinois shore. This can probably be determined by examination of the gauge readings in the U. S. Engineers' Office at Cairo and a point set on the bridge directly above this point.

In addressing this evidence, the Report concludes:

[I]t is my opinion that the purpose of the Dier (sic) correspondence was not to locate the state boundary precisely but simply to place a sign on the bridge somewhere *near the approximate state line to alert motorists that they were entering or leaving Kentucky or Illinois.*

Report at p. 26. [Emphasis added.]

This dramatically supports Kentucky's position in this case. It shows: that an Illinois official recognized that Kentucky's jurisdiction over the river extends to the shore line at the mean, normal water elevation along the Illinois shore; that the official notified the Kentucky Highway Department that placing a state sign on the bridge directly above that point would be the appropriate place to indicate where the jurisdiction of one state begins and the other ends. Such a sign would assist in determining jurisdiction, for example, in the case of an accident on the bridge.

Although the Report concludes that the terms used in the Diers correspondence to describe the location of the boundary "hardly reflect certainty" (Report at p. 26), Kentucky submits that the terms of description are consistent with and support Kentucky's



position in this case.

In regard to Kentucky's evidence concerning the bridges over the Ohio River which connect Kentucky with Illinois, the Report concludes that the evidence is equivocal at best and does not support Kentucky's claim of acquiescence. To this Kentucky excepts.

*Cairo Bridge* - Kentucky introduced an April, 1977 Restoration and Rehabilitation Agreement between Kentucky and Illinois involving the Cairo Bridge wherein the boundary between the two states is described as follows:

WHEREAS, KENTUCKY desires to use said Great River Road funds allocated to KENTUCKY for the portion of the CAIRO BRIDGE deck restoration and rehabilitation south of the ILLINOIS-KENTUCKY State Line, said State Line being previously legislatively established as *the low water mark on the ILLINOIS side of the Ohio River*, and, for the purposes of this Agreement, specified as centerline of Pier B or *Station 20+10.00*.

[Emphasis added.] (Filing No. 61, Exhibit 54.)

To determine and identify the location of *Station 20+10.00*, Kentucky introduced the affidavit of Charles S. Raymer, Engineer, Kentucky Transportation Cabinet, Department of Highways, Director of the Division of Design. (Filing No. 61, Exhibit 55.) Mr. Raymer was asked to examine the General Plan and Elevation Drawing, Cairo Bridge Commission, Ohio River Bridge (Filing No. 61, Exhibit 56) to determine where *Station 20+10.00*, as depicted in the drawing, was located in relation to the Ohio River and the Illinois shore. Mr. Raymer concluded that *Station 20+10.00*, as depicted on the drawing, was located at and was equivalent to the shoreline on the Illinois side of the Ohio River. (Filing No. 61, Exhibit 55.)

*I-24 Bridge* - Kentucky introduced an April, 1965 Bridge Construction Agreement between Illinois and Kentucky for the I-24



Bridge. (Filing No. 61, Exhibit 61.) In sections 6 and 9 of the Construction Agreement, both states agreed that the north normal pool line shall be considered as the boundary line between the State of Illinois and the Commonwealth of Kentucky. The north normal pool line was to be determined and designated by the Corps of Engineers, U.S. Army.

Kentucky submits that the north normal pool line is equivalent to the current low-water mark, as it may exist from time to time or in this instance the Illinois shoreline.

This agreement by the two states that the north normal pool line be the boundary supports Kentucky's exercise of sovereignty over the entire river to the shoreline and Illinois' acquiescence and acceptance of same.

The Report's inference that these bridge agreements as to the boundary were made merely to facilitate the construction of the bridges is without support. In Kentucky Legislative Research Commission's Informational Bulletin No. 81, VII Administrative Comments, the Kentucky Department of Highways states that is customary in the construction of each interstate bridge to have a survey made toward the establishment of the state boundary in the area of the bridge. (Filing No. 12(b), p. 106.) The fact is, the line agreed upon demonstrates Illinois' acquiescence to Kentucky's authority over the breadth of the river.

#### (6) *TAXATION*

In the Report, the Special Master concludes that the evidence regarding the taxation of structures on the river hardly demonstrate that Kentucky has asserted exclusive jurisdiction over the entire breadth of the Ohio River.

The Report ignores Illinois' statement in the Bill of Complaint which states:

Kentucky by claiming and asserting jurisdiction up to the present low-water mark and beyond has sought to divest Illinois of territory properly belonging within its

boundaries. Furthermore, Kentucky's attempted exercise of police, regulatory and *taxing powers over the area to the north of the 1792 low-water mark* is a direct denial of the sovereign rights of the State of Illinois over its own territory.

[Emphasis added.]

*Taxation of service companies* - There are fifteen (15) structures located along the Illinois shore of the Ohio River, portions of which extend past the shoreline into the river. (Filing No. 56, Exhibit 104(A) to (O).) With respect to these fifteen (15) structures, Kentucky has taxed two (2) of them. Kentucky imposed a property tax on Bulk Service Company of Granite City, Illinois. (Filing No. 61, Exhibit 86-92.) The tax bill covered 250 feet of the conveyor belt belonging to Bulk Service on the Illinois side of the river (Kentucky Exhibit 86). After receiving notification of the property tax, correspondence between Bulk Service and the Ballard County, Kentucky Property Valuation Administrator commenced. (Filing No. 61, Exhibit 87-88.) Upon responding to Bulk Service's correspondence, the Property Valuation Administrator informed the company that, "... our records show that the borders go to the low water mark or water edge. Therefore, approximately 250 feet to 300 feet of conveyor belt is on the Kentucky side of the river. This tax is due in Ballard County." (Filing No. 61, Exhibit 88.)

Kentucky also imposed a property tax against Electric Energy, Inc. of Joppa, Illinois (Filing No. 61, Exhibit 93), which is located on the Illinois shore.

Illinois Exhibit 64 indicates that Bunge Corporation was assessed by Illinois. The affidavit from the Alexander County Tax Assessor demonstrates that the Bunge property, which extends into the river, was proportioned for tax purposes based upon the boundary between the states. The tax assessor relied upon a 1949 *plat* prepared by the Illinois Central Railroad, not the 1792 low-water mark which Illinois presently claims to be the boundary

line. The tax assessors from Massac County and Pulaski, Illinois expressly admitted that they do not tax real property located south of the shoreline. (Filing No. 56, Exhibits 72 and 83.) Moreover, the tax assessors for Hardin and Gallatin County, Illinois are uncertain as to whether the structures extending past the Illinois shoreline are included in their tax records. (Filing No. 56, Exhibits 98 and 103.)

Based on the property tax levied against the two structures by Kentucky and the structure which Illinois maintains it has assessed, the Special Master concluded that the evidence shows there is uncertainty in both states as to the exact location of the boundary. Report at p. 37. Even if weight is given to Illinois' taxation of Bunge Corporation, the boundary line used by the tax assessor was established in 1949 and not 1792.

Kentucky's taxation of the aforementioned service companies demonstrates that it taxes up to the northerly shore. Moreover, Illinois maintains that it taxes at least one structure. However viewed, the evidence shows that Illinois does not tax the remaining fourteen (14) structures, all of which have property originating from the northerly bank into the Ohio River.

*Taxation of barges* - Kentucky imposes an *ad valorem* tax on the operation property (barges, tow boats, etc.) owned by four (4) barge companies located in Illinois. (Filing No. 61, Exhibits 77-82.) However, the Report concludes that the taxation of barges and other watercraft traveling the Ohio River does not support Kentucky's claim of exclusive jurisdiction of the entire breadth of the river. Report at p. 38. The Report reaches the aforementioned conclusion because the "sailing line" on the river is either close to the center of the river or near the Kentucky shore. Report at p. 38. It is therefore opined that the sailing line rarely approaches to within 250-300 feet of the Illinois shore (*Id.* at 38).

Kentucky submits that the "sailing line" is not a valid consideration. Kentucky taxes *all* barges using the Ohio River. This includes those barges which load and unload from the Illinois

shore. In *Union Barge Line Corporation v. Marcum*, 360 S.W.2d 130 (1962), Kentucky's then highest court held that the Virginia Compact and the Northwest Ordinance did not impair Kentucky's power to impose taxes on property used on the Ohio River.

#### (7) MINERAL LEASES

The Report errs when it concludes that Kentucky's evidence of mineral leases granted by three Kentucky counties to private companies or individuals to dredge the river bottom north of the thread of the stream within the boundary of the county, "adds nothing to the determination of the location of the Ohio River boundary of those counties." Report at p. 39.

Kentucky takes exception to this conclusion and to the fact that the Report failed to consider other supporting evidence introduced by Kentucky concerning mineral leases that, taken together, establish Kentucky's exercise of dominion and jurisdiction to the low-water mark on the northern shore. (Filing No. 61, Exhibits 114-116, 121.)

Kentucky Revised Statute (KRS) 56.220 gives the county judge/executive of each county bordering on the Ohio River authority to lease all that portion of the river bed lying north of the thread of the stream for the dredging of sand and gravel. (Filing No. 61, Exhibit 114.)

In *Louisville Sand and Gravel Co. v. Ralston*, Ky., 266 S.W.2d 119 (1954), the Kentucky Court construed the term "thread of the stream" as applied to the Ohio River under a lease from a county for dredging sand and gravel pursuant to KRS 56.220. The term meant the middle line of the Ohio River as measured from the state's northern boundary, *the low-water mark on the northern bank or shore*, and the corresponding bank on the southern bank or shore. The Kentucky Court thus defined the county's northern boundary on the Ohio River as extending to the low-water mark on the northern shore. (Filing No. 61, Exhibit 116.)

Kentucky submitted evidence of lease/franchise agreements entered into by three Kentucky counties bordering the Ohio River opposite Illinois granting to private companies or individuals the right to dredge sand and gravel from the bed of the Ohio River lying north of the thread of the stream, within the boundary of the county. (Filing No. 61, Exhibits 117, 118, 119.) As set out above, under KRS 56.220 and *Louisville Sand and Gravel Co., v. Ralston, supra*, "within the boundary of the county" would be from the thread of the river to the low-water mark on the northern bank or Illinois shore. In *Commonwealth v. Henderson County, Ky.*, 371 S.W.2d 27 (1963), the Kentucky Court held that, under KRS 56.220, a county's authority to grant mineral leases in the bed of the Ohio River was not limited to sand and gravel, but also included oil and gas. (Filing No. 61, Exhibit 115.)

In September, 1952, Kentucky leased about 150 miles of the bed of the Ohio River to a private company formed to drill oil and gas wells. The lease included riverbed in Crittenden County, Kentucky, which is opposite to and extends to the Illinois shore. (Filing No. 61, Exhibit 121.)

Kentucky submits that mineral lease/franchise agreements by Kentucky counties granting dredging and drilling rights to private companies and individuals to the low-water mark on the Illinois shore is evidence that Kentucky has exercised dominion and jurisdiction over the full breadth of the river.

#### (8) *FISHING*

The Report is in error when it concludes that evidence submitted by Kentucky regarding fishing licenses does not support Kentucky's claim of exclusive jurisdiction over the river. Report at p. 40. Filing No. 61, Exhibits 122-139, establish that Kentucky issues special licenses for sport and commercial fishing on the Ohio River only. These licenses were created and sold exclusively to citizens of Illinois, Ohio, and Indiana. (Filing No. 61, Exhibits 122-125.) On November 11, 1988, the Kentucky fishing statutes



were amended by regulation, which eliminated these special fishing licenses (sport and commercial). Instead, Kentucky now requires residents of Illinois, Ohio, and Indiana to purchase the Kentucky nonresident license. (Filing No. 61, Exhibits 123-139.)

The Report reasons that no matter where the 1792 low-water mark is located, the area south of that mark is within Kentucky and a license would be required for fishing that area. Report at p. 39. The Report also concludes that "given the current absence of a clear understanding of the exact location of the boundary, a prudent resident of Illinois would acquire a Kentucky Ohio River license along with his own State's license in order to be sure he was licensed to fish the entire breadth of the river." Report at p. 40.

Kentucky submits that the Report again ignores the evidence and draws its conclusion based on a boundary line which has not been fixed, plotted or designated. No weight is given the evidence even though it is uncontroverted.

As previously mentioned, Illinois stated in its Bill of Complaint the following:

The Commonwealth of Kentucky by the actions of its officials and employees has sought to assert the *present low-water mark as its boundary with Illinois*. For example, Kentucky has attempted to require all Illinois residents who desire to fish in the Ohio river to obtain Kentucky fishing licenses, *regardless of whether they are fishing to the north or south of the 1792 low-water mark*. Further, Kentucky wardens have ignored even the present low-water mark by seeking to enforce the hunting and fishing laws of Kentucky *up to the northerly shore*, regardless of the river's level.

Kentucky's enforcement of its fishing laws to the northerly shore does not deny Illinois of its sovereign rights.



(9) *WATERFOWL*

Kentucky submitted evidence of an historical account of a waterfowl enforcement problem that arose nearly 40 years ago along the Ohio River for hunters from Ohio, Indiana and Illinois. It concerned duck hunting along the Ohio River when the northern boundary states' hunting seasons were open and Kentucky's closed. (Filing No. 61, Exhibits 140-148.)

The Report errs in holding that this evidence is irrelevant as hardly applicable to Illinois and because it contains hearsay statements. Report at p. 40.

Kentucky takes exception to this. The evidence is relevant because it is further evidence that Kentucky has always enforced its fishing and hunting laws up to the Illinois shoreline of the Ohio River. Moreover, hearsay evidence arising before the controversy is admissible under Federal Rules of Evidence, Rule 803(20) to prove boundaries.

(10) *ILLINOIS ENABLING ACT, ILLINOIS CONSTITUTIONS  
AND JOINT SELECT COMMITTEE*

Pursuant to the Illinois Enabling Act, enacted by Congress on April 18, 1818, Illinois' boundary with Kentucky was to run along the north-western shore of the Ohio River. 3 Stat. 428 (1818).

Illinois in its Constitutions of 1818, 1848 and 1870 all specifically describe its southern boundary with Kentucky on the Ohio River "along its northwestern shore." (Filing No. 14, Exhibits 1, 2, 3.)

The "Report of the Joint Select Committee Appointed to Investigate the Nature and Extent of the Jurisdiction of Illinois Over the Ohio River: was prepared by an Illinois legislative committee that was appointed to investigate the nature and extent of the jurisdiction of Illinois over the Ohio River." (Filing No. 14, Exhibit 5.)

The report which was submitted to the Illinois Legislature on, January 25, 1849, makes the following statement:

It is conceded that the Ohio river, to the low water mark, is included within the limits of the state of Kentucky.

Report of Joint Select Committee at 1.

The Special Master did not give any weight to the 1818, 1848 and 1870 Illinois Constitutions or the findings of the Illinois Joint Select Committee. Report at pp. 28-29.

These historical documents, particularly the committee report which addressed the issue precisely before this Court, illustrate that the boundary between the states was to be a natural one defined in general terms. See *Handly*, at 383, 384.

Thus, Kentucky submits these documents use of the general term *low-water mark along its northwestern shore* rather than the 1792 low-water mark shows that Illinois has always recognized that its boundary along the Ohio River, is the low-water mark, which is ever changing.

#### (11) GEOGRAPHY OF ILLINOIS

The Report erred in excluding from evidence the *Geography of Illinois*, written by Douglas C. Ridgley and published in 1921 by the University of Chicago which was submitted by Kentucky. Report at p. 29.

Such evidence is relevant and admissible to show reputation in the community, arising before the current controversy as to the understanding of the boundary. Federal Rules of Evidence, Rule 803(20).

The book in a section titled *Legal State Boundary* makes the following statement concerning the location of Illinois' southern boundary along the Ohio river, at page 2:

The southern boundary is along the northwest shore of the Ohio River, for the Kentucky boundary along the Ohio had already been established on the north side of the river. It thus happens that the Ohio River and its islands are in Kentucky, not in Illinois, Indiana, or Ohio.

Kentucky takes exception to the exclusion of this evidence. It shows the understanding among the general population as to the boundary between Illinois and Kentucky.

(12) *HISTORICAL EVIDENCE*

Kentucky submitted a series of newspaper articles dating from 1919 to 1942 which reflected the common understanding in the community of Kentucky's northern boundary, i.e., that Kentucky owned and had jurisdiction over the Ohio River in its entirety, up to the northern low-water mark or shoreline.

The Report sustained Illinois' objection to all the newspaper articles submitted by Kentucky on the ground of relevancy and for containing hearsay and improper opinion testimony. Report at p. 38.

Kentucky takes exception to this. Under Federal Rules of Evidence, Rule 803 Hearsay Exception; Availability of Declarant Immaterial, Rule 803(2) states:

Reputation Concerning Boundaries or General History.  
Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

Newspaper accounts, which are among the source materials of history, are admissible under Rule 803(20) to establish the reputation in the community as to boundaries. See *Montana Power Co. v. Federal Power Commission*, 15 F2d 491, 498 (1950); *Conn. Light and Power Co. v. Federal Power Com'n.*, 557 F2d 349, 356 (1977).

The Report erred in not admitting into evidence the newspaper articles Kentucky submitted in this case, (Filing No. 61, Exhibits 157-161), as well as (Filing No. 61, Exhibits 66a, 83-85, 120, 121, 138, 139, 145, 147, 148, 162 163).

## B.

**Evidence Submitted by Illinois  
in Opposition to Kentucky's Claim**

(1) *ILLINOIS CASE DECISIONS*

The Report concludes that Illinois asserted jurisdiction over an *undefined* portion of the river and therefore had not acquiesced to Kentucky's exclusive assertion of authority. Report at p. 35. Kentucky takes exception to this conclusion.

Illinois submitted evidence which it claims was proof that it had not acquiesced to Kentucky's authority. This evidence included published decisions by Illinois appellate courts, city ordinances, and permits authorizing dredging, disposal of sewage, and construction of structures. Kentucky submits none of this evidence proves that Illinois has not acquiesced.

Illinois and the Special Master place heavy reliance on the holding in *Joyce-Watkins Co. v. Industrial Commission*, 325 Ill. 378, 156 N.E. 346 (1927). In *Joyce-Watkins*, an Illinois court recognized that the boundary between Illinois and Kentucky on the Ohio River is the "low-water mark." 156 N.E. at 347. The court construed this term to mean, "the point to which the water receded at its lowest stage." *Id.* at 348.

The *Joyce-Watkins* court refused to address the plaintiff in error's contention that the boundary was the 1818 low-water mark, because Illinois was not a party to the action. *Id.* However, the court did recognize that the low water as boundary was not a "definitely fixed line," but would move over time. *Id.*

*People Ex Rel. Scott v. Dravo Corporation*, 10 Ill. App. 3rd 944, 295 N.E.2d 284 (1973), like *Joyce-Watkins*, did not decide the boundary between Kentucky and Illinois.

Kentucky submits that *Joyce-Watkins* and *Dravo Corp.*, *supra*, merely demonstrate that the Ohio River is an ever changing boundary and Illinois has judicial jurisdiction over matters within her boundary. These cases do not fix, designate, or recognize the

1792 low-water mark as the boundary between the states.

Filing No. 55, Illinois Exhibits 34-36, 38, 40, 42-46, 49, 51-55 are copies of Illinois city ordinances or leases that assert that the city's jurisdiction extends to the low-water mark or the water's edge at low-water mark of the Ohio River.

In particular Exhibit 47 is a Metropolis, Illinois ordinance which describes a portion of the city limits along the Ohio River as the "low water mark of 1873 on the State Line of Illinois and Kentucky."

Although the delineation of the city's jurisdiction as the low-water mark of 1873 is unexplained, this evidence supports Kentucky's position that the boundary is not, and never has been, a fixed line as of 1792.

Illinois Exhibits 54 and 55 present copies of Illinois Acts of 1867 and 1859 respectively, which describes the corporate limits of Cairo, Illinois as extending to the "middle of the main channels of the Ohio and Mississippi Rivers" and the boundary of the newly merged city of Mound City, Illinois along the Ohio River as "the middle of the main channel of the Ohio River."

To the extent these Acts extend the corporate boundaries beyond the low-water mark, they are inconsistent with and violate the Illinois Constitutions of 1818, 1848 and 1870, which described the state's boundary as extending only to the northwestern shore. Contrary to the Special Master's finding (Report at pp. 32-35), the Acts neither support Illinois' position nor refute Kentucky's defense of acquiescence.

Illinois' admission of 73 permits concerning construction of docks, mooring anchors, access ramps on or over the river, sand and dredging, bridge construction, bank protection and sewage outlets do not prove that Illinois has not acquiesced to Kentucky's exercise of jurisdiction.

Regarding the construction of piers and wharves, this Court in *New Jersey v. Delaware*, 291 U.S. 361 (1933) states the following:



The acts of dominion by riparian proprietors are connected with the building of wharves and piers that project into the stream. The structures were built and maintained without protest on the part of Delaware, and no doubt with her approval. *There is nothing in their presence to indicate an abandonment by the Sovereign of title to the soil.* By the law of waters of many of our states, a law which in that respect has departed from the common law of England, riparian proprietors have very commonly enjoyed the privilege of gaining access to the stream by building wharves and piers, and this though the title to the foreshore or the bed may have been vested in the state.

*Id.* at 375. [Emphasis added.]

The Court also concluded that "from acquiescence in these improvements of the river front, there can be no legitimate inference that Delaware made over to New Jersey the title to the stream up to the middle of the channel or even the soil under the piers." *Id.* at 375-376.

Consistent with *New Jersey v. Delaware*, Kentucky recognizes the rights of Illinois to systematically develop its shore and the riparian right of accessibility to the river. However, such recognition does not divest Kentucky of its boundary to the present low-water mark.

(2) KENTUCKY ATTORNEY GENERAL OPINION AND  
LEGISLATIVE RESEARCH COMMISSION BULLETINS  
AND PERKS V. McCracken

The report is erroneous when it concludes that a Kentucky Attorney General's Opinion, OAG 63-847 and two Information Bulletins No. 81 and No. 93, published by the Kentucky Legislative Research Commission and a decision by a Kentucky court in *Perks v. McCracken*, 169 Ky. 590, 184 S.W.2d (1916), overcome Kentucky's position that it has always asserted dominion



and jurisdiction over the entire Ohio River to the prevailing northerly low-water mark or shoreline. To this, Kentucky takes exception.

(3) *KENTUCKY OAG 63-847*

This opinion, *issued in 1963*, was not written in the context of an original action before this Court regarding the location of a boundary between two states. As such it is only advisory in nature and cannot be considered as controlling authority in this case. Moreover, the opinion, OAG 63-847, is inaccurate because it misconstrues the holding in *Indiana v. Kentucky* for the reasons stated in our Argument I, (*supra*).

On pages 105-107 of Kentucky Legislative Research Commission Informational Bulletin No. 81, published in 1969, under the heading of "VII Administrative Comments" the results of inquiries of departments of Kentucky State government whose administration was actively concerned with problems encompassing the Ohio River as a state boundary are recorded. (Filing No. 12(b).)

Under Department of Fish and Wildlife Resources, the following is stated:

The Department's policy is to enforce Kentucky fishing regulations to the natural shoreline on the opposite bank except for embayments. Residents of Ohio, Indiana, and Illinois may fish with what are known as the Kentucky Ohio River Sport Fishing License or the Kentucky Ohio River Commercial Fishing License. These licenses are good only on the Ohio River and may be purchased for the same fee that a resident of Kentucky pays for Kentucky resident licenses.

[Emphasis added.]

Footnote one of this section indicates that this information as to the Department's policy of enforcing its fishing regulations came

from a letter from Minor Clark, Commissioner of Fish and Wildlife Resources.

This is the same Commissioner to whom OAG 63-847 was written. Thus despite the conclusions in the attorney general's opinion, the Kentucky Department of Fish and Wildlife's policy was to enforce its laws to the shoreline.

This evidence is consistent with the testimony of Fish and Wildlife Officers David Loveless and David Donan Jenkins who testified that they enforced Kentucky's fishing laws up to the Illinois shoreline. (Loveless Deposition, Filing No. 23(c) at pp.15-16; Jenkins Deposition, Filing No. 23(d) at p. 5.) Note particularly Officer Jenkins testimony since he had been enforcing these for over 30 years. A time period which includes the time of the policy statement of the Commissioner and OAG 63-847. (Jenkins Deposition, Filing No. 23(d) at p. 2.)

Thus, despite the issuance of OAG 63-847, Kentucky's Department of Fish and Wildlife, continued to exercise dominion and jurisdiction up to the current low-water mark or Illinois shoreline.

(4) *KENTUCKY LEGISLATIVE RESEARCH COMMISSION  
INFORMATIONAL BULLETINS NO. 81 AND NO. 93*

These Informational Bulletins were published in 1969 and 1972.

After Ohio filed suit against Kentucky in 1966, the Kentucky legislature established a subcommittee to study the boundary question.

In the Forward of Informational Bulletin No. 81, the Director of the Legislative Research Commission states that the Commission voted to establish a Subcommittee on the Ohio River Boundary and charged it to make a long range comprehensive study of all facets of the boundary problem.

In concluding this Forward, the Director states:

This first report of the Subcommittee is concerned primarily with that portion of the river forming the boundary between the State of Ohio and the Commonwealth of Kentucky; precedence was given this part of the boundary since the State of Ohio had filed an original action concerning the boundary against the Commonwealth in the October, 1965 term of the Supreme Court of the United States. *Because of this pending litigation, no attempt has been made to reach conclusions or to summarize this work.* The material presented here is fully cited and documented. Several works of interest were examined but not used in this report. Much of that material will form the basis of the second report of the Subcommittee covering that part of the Ohio River from the Great Miami to the Mississippi. [Emphasis added.]

The Special Master's Report erroneously concludes that mention in this Forward of concern over the recurrence, over a hundred and fifty year period, of litigation over the location of Kentucky's northern Ohio River boundary is inconsistent with Kentucky's contention in this case that it has continuously asserted the low-water mark as it exists from time to time as its boundary with Illinois. Kentucky submits there has been no recurring litigation with Illinois over the boundary between the two states.

Informational Bulletin No. 93, *published in 1972*, covers Kentucky's Ohio River boundary from the Great Miami River to the Wabash River which covers Kentucky's boundary with Indiana.

The Report, in quoting from the narrative portion of the Legal Opinion, overlooks the clearly stated conclusion of that opinion, which reads, in relevant part:

In conclusion, from examination of the historical documents, the statutes of the various states, the constitutions of the states, and the physical evidence we

can only conclude that the boundary of Kentucky is as it has always been claimed; that the entire river Ohio for the 664 miles that it flows past Kentucky belongs to Kentucky . . . .

[Emphasis added.] Kentucky Legislative Research Commission, Information Bulletin No. 93, p. 4.

That conclusion reflects the official position consistently enacted by Kentucky's legislature. In 1810, the Kentucky legislature enacted a statute asserting its sovereignty over the entire river. This was reaffirmed with the concurrence of Indiana in the Compact agreeing to the boundary between Kentucky and Indiana as the abandoned-channel boundary fixed at Green River Island in *Indiana v. Kentucky* and "thence upstream" and "thence downstream" respectively with the low-water mark of the Ohio River on that side. 1942 Ky. Acts, Ch. 116; 1943 Ind. Acts, Ch. 2; 57 Stat. 248 (1943).

Kentucky submits that these Informational Bulletins, No. 81 and No. 93 issued by the Kentucky Legislative Research Commission do not and cannot represent the sovereign position of the Commonwealth nor are they binding authority in this litigation. They simple do not refute Kentucky's continuous exercise of jurisdiction and dominion over the entire river to the Illinois shoreline.

#### (5) *PERKS V. McCRACKEN*

The Report erroneously concludes that the Kentucky court decision in *Perks v. McCracken*, 169 Ky. 590, 184 S.W. 89 (1916), defines Kentucky's Ohio River boundary specifically as the 1792 low-water mark.

The case involved a private lawsuit by McCracken against Perks and another based upon his claim that he owned a towhead or island sand bar in the Ohio River near Mound City, Illinois, and that the defendants had unlawfully removed sand and gravel from the towhead.

The case turned on whether the island was in Kentucky territory or was a part of Illinois. The answer depended upon whether the island in question was between the low-water mark on the north side as it existed when Kentucky became a state and the Kentucky shore. The Court found that it was and thus, the island was part of Kentucky.

This is the same legal test applied in *Indiana v. Kentucky* to determine in which state an island belonged, i.e., if the island was within Kentucky's jurisdiction when it became a state, no subsequent change in the river could divest it of its jurisdiction over that island. Reference to the 1792 line was only necessary to determine if the island was within Kentucky's jurisdiction when it became a state.

Thus, Kentucky submits the case simply determined the jurisdiction of an island. It did not specifically define Kentucky's boundary along its entire boundary with Illinois as the 1792 low-water mark.

#### (6) LACHES

Whether the equitable considerations of Illinois' 168 year delay in bringing its claim to this Court are addressed in terms of laches or prescription and acquiescence, the effect of the delay is the same.

As the Court, in *Indiana v. Kentucky*, stated in discussing Indiana's 70 year delay in asserting its claim to Green River Island:

Why then did she delay to assert by proper proceedings her claim to the premises? On the day she became a State her right to Green River Island, if she ever had any, was as perfect and complete as it ever could be. . . . On that day, and for many years afterwards, as justly and forcibly observed by counsel, there were perhaps scores of living witnesses whose testimony would have settled, to the exclusion of a reasonable doubt, the pivotal fact upon which the rights of the two States now hinge and



yet she waited for over seventy years before asserting any claim whatever to the island, and during all those years she never exercised or attempted to exercise a single right of sovereignty or ownership over its soil.

163 U.S. at 510.

Kentucky submits that Illinois' stale claim has resulted in the unavailability of generations of witnesses whose testimony could have established Kentucky's assertion of sovereignty and jurisdiction to the current low-water mark or shoreline and Illinois' acquiescence thereto.

This long delay should be considered both in terms of *laches* as it relates to the inequitable loss of available evidence and *acquiescence* in the sense that inaction alone can establish that affirmative defense when it continues for a sufficiently long period. *Georgia v. South Carolina*, 497 U.S. \_\_ (1990).

### III.

**WHETHER THE CONSTRUCTION OF DAMS ON THE OHIO RIVER BETWEEN ILLINOIS AND KENTUCKY PERMANENTLY RAISED THE LEVEL OF THE RIVER ABOVE ITS LEVEL IN 1792, AND AS A RESULT, THE PRESENT LOW-WATER MARK ON THE ILLINOIS SIDE OF THE RIVER IS FARTHER NORTH THAN IT WAS IN 1792, IS NOT BEFORE THE COURT AT THIS TIME.**

#### A.

#### *ACCRETION, EROSION AND AVULSION*

It is Kentucky's position that if it prevails on its affirmative defense of acquiescence, then the well-recognized principles of accretion, erosion and avulsion would obviously apply to a current shoreline boundary as it may change from time to time. Kentucky excepts to the Report's conclusion that *Ohio v. Kentucky*, 444 U.S. 335 (1980) prohibits the application of the principles of accretion, erosion and avulsion, because the Court in that case did not



consider the defense of acquiescence or reject that affirmative defense in reaching the majority decision.

## B.

### CONSTRUCTION OF DAMS

Kentucky submits that the Report's discussion of the construction of the dams on the Ohio River between Illinois and Kentucky and whether their effect was to permanently raise the level of the river above its level in 1792 and as a result the present low-water mark on the Illinois side of the river is farther north than it was in 1792 is *premature* as the issue is not before the Court at this time.

Kentucky concedes that the effect of the dams was to raise the level of the water and that some changes may have occurred in the shoreline. However, Kentucky, at this time, does not know what changes occurred in specific instances and what changes may have occurred in the shoreline along the entire length of its boundary with Illinois.

The effect of the dams and resultant relocation of the water is a matter that will have to be factually determined, if need be, at a later date on the basis of the law found to be applicable to the case.

Moreover, under the doctrines of acquiescence and laches, Illinois has acquiesced to whatever changes in the river which may have occurred as a result of the dams by failing to bring any proceedings to claim a specific line either before or immediately after the construction of the dams.

Furthermore, consistent with Kentucky's position that the current low-water mark is the boundary line and that the principles of accretion and avulsion apply to this line, is the rule that the erecting of artificial structures such as dams and locks does not alter the application of the accretion doctrine. *County of St. Clair v. Lovington*, 90 U.S. (23 Wall.) 46, 50-66 (1874), unless, perhaps, structures are erected for the specific purpose of causing the accretion. *Beaver v. United States*, 350 F.2d 4 (9th Cir. 1965),

*cert. denied*, 383 U.S. 937 (1966) Accord, *United States v. Claridge*, 416 F.2d 933 (9th Cir. 1969), *cert denied*, 397 U.S. 961 (1970); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845); *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973).

In this regard, Kentucky submits that any subsequent changes in the river resulting from the paramount right of the United States Government to improve navigation by erecting dams to maintain a nine foot channel of navigation should be accretive in nature and the boundary should continue to follow the prevailing low-water mark. The effect of inundation of some of the shoreline, if any, is minimal compared to the acknowledged riparian benefit to both sovereigns of improved navigation on this valuable avenue of commerce.

#### IV. CONCLUSION

Kentucky submits that it has proven its affirmative defense of acquiescence by a preponderance of the evidence. Therefore, its motion for summary judgment should be granted.

Respectfully submitted,

**FREDERIC J. COWAN**

*Attorney General*

Capitol Building

Frankfort, Kentucky 40601

**JAMES M. RINGO**

*Assistant Attorney General*

Capitol Building

Frankfort, Kentucky 40601

(502) 564-7600

Counsel of Record

**RICKIE L. PEARSON**

*Assistant Attorney General*

Capitol Building

Frankfort, Kentucky 40601

*Counsel for Defendant*

Supreme Court, U.S.  
**FILED**  
**DEC 14 1990**  
MICHAEL P. SPANOL, JR.  
CLERK

3

No. 106, ORIGINAL

---

In The  
**Supreme Court of the United States**  
October Term, 1990

---

STATE OF ILLINOIS,

*Plaintiff,*

versus

COMMONWEALTH OF KENTUCKY,

*Defendant.*

---

**BRIEF IN RESPONSE TO KENTUCKY'S  
EXCEPTIONS TO REPORT OF SPECIAL MASTER  
FILED OCTOBER 1, 1990**

---

NEIL F. HARTIGAN  
State of Illinois  
*Attorney General*  
500 South Second Street  
Springfield, IL 62706

JOHN BRUNSMAN  
*Assistant Attorney General*  
500 South Second Street  
Springfield, IL 62706  
(217) 782-9062  
*Counsel of Record*

---



## TABLE OF CONTENTS

	Page
Table of Authorities .....	iv
Statement of the Case .....	1
Summary of Argument .....	5
Argument .....	9
I. PRIOR DECISIONS OF THIS COURT ESTABLISHING THE BOUNDARY BETWEEN THE COMMONWEALTH OF KENTUCKY AND THE STATES OF INDIANA AND OHIO, TO BE THE LOW-WATER MARK ON THE NORTHERLY SIDE OF THE OHIO RIVER AS IT EXISTED IN THE YEAR 1792 ARE CONTROLLING PRECEDENTS ON THE QUESTION OF KENTUCKY'S BOUNDARY WITH ILLINOIS.....	9
A. The fact that this Court has not considered acquiescence in the context of a case determining the entire boundary of any state bordering with Kentucky on the Ohio River is totally irrelevant to the threshold question, in this or any boundary case, of what is the legal rule to apply in determining the location of the disputed boundary .....	9
B. The prior decisions of this Court clearly provide that Kentucky's boundary with the states bordering it along the Ohio River is the low-water mark on the northerly side of the Ohio River as it existed in 1792.....	10
II. THE RECORD DOES NOT SUPPORT KENTUCKY'S AFFIRMATIVE DEFENSES OF ACQUIESCENCE AND LACHES AND, THEREFORE, ILLINOIS' BOUNDARY WITH KENTUCKY IS THE LOW-WATER MARK ON THE ILLINOIS SIDE OF THE OHIO RIVER AS IT EXISTED IN 1792.....	13

TABLE OF CONTENTS - Continued

	Page
A. Kentucky has failed to meet its burden of establishing its affirmative defense of acquiescence .....	16
1. Kentucky sources have consistently recognized the 1792 low-water mark as Kentucky's boundary .....	17
a. Kentucky Attorney General's Opinion .....	17
b. Bulletins of Kentucky Legislative Research Commission .....	18
c. Kentucky case law .....	20
2. Kentucky's evidence does not support its claim to have continuously asserted a boundary identified by the low-water mark as it exists from time to time ...	21
a. Testimony of Kentucky law enforcement officers.....	21
b. Testimony of coroners.....	24
c. Testimony of Coast Guard officers...	29
B. Illinois has exercised jurisdiction over a portion of the Ohio River throughout its history and, thus, has not acquiesced to the boundary claimed by Kentucky in this case .....	32
1. Illinois sources relied upon by Kentucky do not demonstrate acquiescence .....	33
a. Diers' correspondence .....	33
b. Bridge agreements.....	34
c. Former Illinois Constitutions.....	35



## TABLE OF CONTENTS - Continued

	Page
d. <i>The Geography of Illinois</i> .....	36
e. Report of Joint Select Committee ...	37
2. Illinois has asserted authority over a portion of the Ohio River .....	37
a. Illinois case law .....	37
b. Illinois legislative and executive actions .....	40
C. The supplemental materials submitted by the parties support the conclusion that Ken- tucky has failed to meet its burden of proof on the issue of acquiescence .....	44
D. Laches .....	46
E. Accretion, erosion and avulsion .....	47
III. THE CONSTRUCTION OF DAMS ON THE OHIO RIVER HAS PERMANENTLY RAISED THE LEVEL OF THE RIVER ABOVE ITS LEVEL IN 1792 SO THAT THE PRESENT LOW-WATER MARK IS FARTHER NORTH THAN THE LOW- WATER MARK IN 1792 .....	47
CONCLUSION .....	48

## TABLE OF AUTHORITIES

Page

## CASES

<i>Arkansas v. Tennessee</i> , 246 U.S. 158 (1918) . . .	6, 14, 15, 16
<i>Arkansas v. Mississippi</i> , 250 U.S. 39 (1919) . . .	6, 14, 15, 16
<i>Ensminger v. People</i> , 47 Ill. 384 (1868) . . . . .	37, 38
<i>Handly's Lessee v. Anthony</i> , 5 Wheat (18 U.S.) 374 (1820) . . . . .	5, 10, 23, 37
<i>Henderson Bridge Co. v. Henderson City</i> , 173 U.S. 592 (1899) . . . . .	5, 12, 46
<i>Indiana v. Kentucky</i> , 136 U.S. 479 (1890) . . . . .	<i>passim</i>
<i>Iowa v. Illinois</i> , 147 U.S. 1 (1893) . . . . .	15, 16
<i>Joyce-Watkins Co. v. Industrial Commission</i> , 325 Ill. 378 (1927) . . . . .	4, 7, 38, 39, 40
<i>Kentucky v. Indiana</i> , 474 U.S. 1 (1985) . . . . .	12
<i>Maryland v. West Virginia</i> , 217 U.S. 1 (1910) . . . . .	13
<i>New Jersey v. Delaware</i> , 291 U.S. 361 (1934) . . . . .	43
<i>Ohio v. Kentucky</i> , 444 U.S. 335 (1980) . . . . .	<i>passim</i>
<i>Oklahoma v. Texas</i> , 272 U.S. 21 (1926) . . . . .	5, 6, 9, 16, 24
<i>People ex rel. Scott v. Dravo Corp.</i> , 10 Ill. App. 3d 944 (1973) . . . . .	4, 7, 40
<i>Perks v. McCracken</i> , 169 Ky. 590 (1916) . . . . .	<i>passim</i>
<i>Rhode Island v. Massachusetts</i> , 12 Pet. (37 U.S.) 657 (1838) . . . . .	46
<i>Rhode Island v. Massachusetts</i> , 4 How. (45 U.S.) 591 (1846) . . . . .	13

## TABLE OF AUTHORITIES - Continued

	Page
<i>Union Bridge Co. v. Industrial Commission</i> , 287 Ill. 396 (1919) .....	38
<i>United States v. Summerlin</i> , 310 U.S. 414 (1940) .....	46
<i>Virginia v. Tennessee</i> , 148 U.S. 503 (1893) .....	13
CONSTITUTIONS	
Constitution of Illinois 1818, Introduction .....	35
Constitution of Illinois 1848, Art. I .....	35
Constitution of Illinois 1870, Art. I .....	33, 35
STATUTES	
Illinois Enabling Act, 3 Stat. 428 (1818) .....	36
Laws of Illinois 1911, p. 115 .....	42
Laws of Illinois 1897, p. 248 .....	4, 7, 41
Sec. 18 of An Act in relation to the regulation of the rivers, lakes and streams of the State of Illinois, Ill. Rev. Stat., ch. 19, par. 65 .....	4
MISCELLANEOUS	
Bulletins, Kentucky Legislative Research Commission	
No. 81, December 1969 .....	6, 18, 19
No. 93, December 1972 .....	6, 19
Geography of Illinois .....	36
Ky. Att'y Gen. Op. No. 63-847, issued September 13, 1963 .....	1, 6, 17, 20

## TABLE OF AUTHORITIES - Continued

	Page
Ill. Att'y Gen. Op. No. 215, issued September 18, 1961 .....	40
Ill. Att'y Gen. Op. No. 149, issued December 10, 1980 .....	40
Report of Joint Select Committee Appointed to Investigate the Nature and Extent of the Juris- diction of Illinois Over the Ohio River, January 25, 1849 .....	37
Report of the Special Master, <i>Ohio v. Kentucky</i> , No. 29, Original, January 3, 1979 .....	34

## STATEMENT OF THE CASE

Illinois initiated this original action on July 24, 1986 seeking an order from this Court declaring its boundary with Kentucky to be the low-water mark on the Illinois side of the Ohio River as it existed in 1792. In its Answer filed December 15, 1986 Kentucky denied that the boundary is the 1792 low-water mark, claiming instead the low-water mark "as it exists from time to time". In support of its position, Kentucky cited the riparian principles of accretion, erosion and avulsion, and the equitable defenses of acquiescence and laches. Since that time, Kentucky has stated that its defense based on accretion, erosion and avulsion is not an independent basis for its position, but will only be applicable if it first prevails on its defense of acquiescence. Filing No. 52 at 7. Following lengthy discovery, the case was submitted to the Special Master on cross motions for summary judgment on January 4, 1990. Filings No. 39-44 and 47-52. After receiving supplemental documentation requested from the parties at the January 4 hearing, the Special Master submitted his report recommending a finding in favor of Illinois on all issues, which was formally received and ordered filed by the Court on October 1, 1990.

It is not disputed that Illinois, like Indiana and Ohio, was created from a portion of the territory northwest of the Ohio River ceded to the United States by Virginia in 1784, or that Kentucky was made a state in 1792, having been formed from a portion of the territory retained by Virginia. Exceptions of the Commonwealth of Kentucky to the Report of the Special Master filed October 1, 1990 (Exceptions) at 5-6.

Kentucky authorities have recognized that its Ohio River boundary is marked by the low-water mark on the northern side of the river as it existed in 1792, based on this Court's decision in *Indiana v. Kentucky*, 136 U.S. 479 (1890). These authorities include the decision of the Kentucky Supreme Court in *Perks v. McCracken*, 169 Ky. 590 (1916), Kentucky Attorney General Opinion No. OAG

63-847, issued in 1963, Filing No. 12(l), and Informational Bulletins Nos. 81 (1969) and 93 (1972), issued by the Legislative Research Commission of the Kentucky General Assembly. Filings No. 12(b) and 12(a).

In order to support its claim to have asserted continuous jurisdiction over the entire breadth of the Ohio River up to the low-water mark "as it exists from time to time", Kentucky submitted the testimony of four law enforcement officers, two Kentucky coroners, and two Coast Guard officers. One of the law enforcement officers described Kentucky's boundary as "the waterline, high water-mark or low water-mark", and then settled on "low-water mark". Filing No. 23(a) at 7. The others described it variously as "the normal standing pool of the Ohio River", Filing No. 23(c) at 7, "the water edge of the northern shore", Filing No. 23(d) at 5-6, or the point where the water touches the bank, Filing No. 26 at 5.

The Kentucky coroners identified several deaths on the river handled by their respective offices. In all of the cases identified, however, the body was recovered at a point south of the 1792 low-water mark as identified by Illinois' witness, Mr. Kriesle, or it was impossible to determine at what point the body was recovered. Report of Special Master at 23-24.

In response to the evidence provided by the two Kentucky coroners, Illinois submitted the testimony of coroners from the six Illinois counties bordering the Ohio River. Their opinions as to the present location of the boundary varied. Dr. Charles Diekroeger, coroner of Massac County, Illinois, testified for example that he did not know where it was located. Filing No. 37 at 7-8. Similarly, Mr. A. C. Cox, former coroner of Gallatin County, Illinois, also stated that he was not certain where the boundary was, Filing No. 34 at 6-7, while his son, Charles A. Cox, the present coroner, stated that "it was either a high-water mark or a low-water mark \* \* \* back in the late 1700's". Filing No. 46 at 6-7.



In two of the Illinois counties arrangements had been made between the Illinois coroner and his Kentucky counterpart to resolve the question of jurisdiction over deaths occurring in the river. The first such arrangement was described by Mr. Granville Brownfield, coroner of Hardin County, Illinois. Although Mr. Brownfield contacts the Kentucky coroner to seek his permission to handle a body recovered in the Ohio River, the Kentucky coroner has always given that permission, even when the body of the deceased was still in the river at the time the Kentucky coroner arrived on the scene. Filing No. 45 at 5 and 13.

The second such arrangement was described by A. C. Cox, who testified that he and his Kentucky counterpart had agreed that each would be responsible for the remains of their own states found in the Ohio River. Filing No. 34 at 5. Mr. Cox, in fact, recalls one incident where he had to drive to Kentucky to recover the bodies of three Illinois residents recovered from the river. *Id.* at 12.

The first of two Coast Guard officers identified by Kentucky was John L. Bailey, Commanding Officer of the U.S. Coast Guard's Paducah Maritime Safety Station from 1976 to 1981. Filing No. 23(b) at 4-5. Kentucky alleged in its response to Illinois' interrogatories that Coast Guard personnel and Kentucky State Troopers had to deal with a threat of violence on the Ohio because "Illinois acknowledged it had no authority on the river". Filing No. 11 at 5. In fact, Commander Bailey testified that although an Illinois officer had expressed the opinion that he did not have jurisdiction on the river, it was nonetheless Illinois State Police officers who joined the Coast Guard personnel in the small boats assigned by Cmdr. Bailey to enforce the security or safety zone he imposed on the river. Filing No. 23(b) at 8-10 and 18-19.

Insofar as his personal understanding of the location of the boundary was concerned, Cmdr. Bailey was uncertain, saying that he did not recall whether it was the low water line, the pool line, or just what line it was. *Id.* at 15-16.

Kentucky also identified Coast Guard Captain Thomas Robinson and in particular an incident involving a fire on the towboat *Bayou Cauba*. Captain Robinson testified that the Golconda, Illinois volunteer fire department was unwilling to assist in dealing with this situation and that it did not believe it had the expertise to do so. Filing No. 25 at 7. When asked for his understanding of the boundary location, Captain Robinson identified the line as being marked by the low-water mark "fixed by the year in which that decision was made by whatever made it". *Id.* at 34.

In support of its position that it has not acquiesced to the boundary claimed by Kentucky, Illinois identified the decision in *Joyce-Watkins Co. v. Industrial Commission*, 325 Ill. 378 (1927). The Illinois Supreme Court acknowledged in that case that Illinois' boundary on the Ohio River to be the "low-water mark" on its side of the river. It concluded, however, that this phrase meant "the point to which the waters of that river have receded at its lowest stage". *Id.* at 383. This rule continued to be cited as late as 1973 in *People ex rel. Scott v. Dravo Corp.*, 10 Ill. App. 3d 944 (1973).

Illinois also submitted various legislation enactments and evidence of the enforcement of those enactments by the executive branch of its government in support of its argument that it has asserted jurisdiction over a portion of the Ohio River and has not acquiesced to Kentucky's claim to have exclusive jurisdiction over the entire river. Examples of such legislation include a statute requiring a license to occupy a shantyboat on the Ohio River, Laws of Illinois 1897, p. 248, Filing No. 10(k), and "An Act in relation to the regulation of rivers, lakes and streams of

the State of Illinois", Ill. Rev. Stat. 1987, ch. 19, par. 65. Pursuant to this latter statute, Illinois has issued 73 permits authorizing construction in the Ohio River or dredging of material from its bed. Filings 42(a) to 42(d) and Filing No. 55, Exhibits 29-33.

Finally, the record discloses that neither state has taxed the vast majority of structures extending from the Illinois shore into the Ohio River. Of the 15 such structures identified, Filings No. 56-58, Illinois has taxed only one. Filing No. 56, Exhibit 64. Kentucky has also consistently taxed only one structure. Its efforts to tax a second have resulted in a protest filed by the taxpayer. Filing No. 61, Exhibits 93 and 86-92.

---

### SUMMARY OF ARGUMENT

Kentucky's Ohio River boundary with the states created from the Virginia Cession is the low-water mark on the northern shore of the river as it existed in 1792. *Handly's Lessee v. Anthony*, 5 Wheat (18 U.S.) 374 (1820); *Indiana v. Kentucky*, 136 U.S. 479 (1890); *Henderson Bridge Co. v. Henderson City*, 173 U.S. 592 (1899); and *Ohio v. Kentucky*, 444 U.S. 335 (1980). Since Illinois, like Indiana and Ohio, was formed from this territory, its boundary with Kentucky is the 1792 low-water mark on the Illinois side of the river.

Kentucky cannot avoid the precedent of these cases unless it can prove its defense of acquiescence by demonstrating: (1) a continuous assertion of the boundary it claims in this litigation; and (2) acquiescence therein by Illinois. *Oklahoma v. Texas*, 272 U.S. 21 (1916). Kentucky cannot meet its burden as to either part of that test.

As previously noted by the Court in *Ohio v. Kentucky*, *supra* at 340-341, Kentucky itself has repeatedly acknowledged the 1792 low-water mark to be its proper boundary. Kentucky's assertion of the 1792 line can be found in its argument to the Court in *Indiana v. Kentucky* in 1890, in the decision of the Kentucky court in *Perks v. McCracken*,

169 Ky. 590 (1916), in Opinion of the Kentucky Attorney General No. OAG 63-847 issued in 1963, Filing No. 12(i), and in Information Bulletins Nos. 81 (1969), Filing No. 12(b), and 93 (1972), Filing No. 12(a), of the Legislative Research Commission of the Kentucky General Assembly.

Despite the existence of these documentary sources from all three branches of its government acknowledging the 1792 low-water mark, Kentucky asserts now that it has "always" claimed its boundary to be the low-water mark "as it exists from time to time". In fact, the record discloses that Kentucky has never claimed such a boundary anywhere except in this litigation.

The heart of Kentucky's case in support of its defense of acquiescence is the testimony of its four law enforcement officers, but this evidence fails to support Kentucky's case for a number of reasons. First, the witnesses differ among themselves as to their opinions on the location of the boundary, with no two of them describing it in identical terms, and none describing it in the terms Kentucky claims in its Answer. In addition, the very fact that the opinions of these witnesses also differ from the Kentucky documentary sources already cited demonstrates the lack of a continuous claim of right necessary for the defense of acquiescence. See *Oklahoma v. Texas*, *supra*.

In addition, even if the statements of these witnesses represent the unwritten policy of two Kentucky law enforcement agencies on their perception of their territorial jurisdiction, such policy has no effect on the boundary line already established by prior decisions of this Court. See *Arkansas v. Tennessee*, 246 U.S. 158 (1918) and *Arkansas v. Mississippi*, 250 U.S. 39 (1919).

Furthermore, even if it were assumed that Kentucky could establish a continuous claim to a boundary defined as the low-water mark as it exists from time to time, it cannot demonstrate acquiescence by Illinois to such a line. Not only did Illinois not acquiesce to the boundary claimed by Kentucky in this case, but for some 46 years



Illinois authorities asserted a boundary even more favorable than the 1792 low-water mark which Illinois now acknowledges to be correct.

In *Joyce-Watkins v. Industrial Commission*, 325 Ill. 378 (1927), the Illinois Supreme Court was asked to determine whether an accident that occurred 8 to 10 feet from the existing Illinois shore took place within Illinois. The court started with the premise that Illinois' boundary was the "low-water" mark on its side of the river, and concluded that this phrase meant "the point to which the waters of that river here receded at its lowest stage". *Id.* at 383. Applying that definition to the case before it, the court concluded that if the river had ever receded south of the point of the accident, that point would be within Illinois. Thus, although the court did, as Kentucky points out, contemplate a moving boundary, that movement would always favor Illinois, as each record for low water would move the boundary closer to Kentucky. This rule was cited as late as 1973 in the Illinois appellate court's decision in *People ex rel. Scott v. Dravo Corp.*, 10 Ill. App. 3d 944 (1973).

Evidence of Illinois' assertion of jurisdiction over a portion of the waters of the Ohio River can also be found in legislation enacted in 1897 requiring a license to occupy a shantyboat on the "Ohio, Mississippi, Wabash, Illinois, or other navigable river \* \* \* within this State", Laws of Illinois 1897, p. 248, Filing No. 10(k), and prosecutions undertaken under that statute. Filing No. 55, Exhibits 23-26.

Similar evidence may also be found in the 73 permits issued by the State of Illinois for the building of structures on the Ohio River or the dredging of sand and gravel from its bed pursuant to section 18 of "An Act in relation to the regulation of the rivers, lakes and streams of the State of Illinois", Ill. Rev. Stat. 1987, ch. 19, par. 65, which requires such a permit before any work of any kind is done "in any of the public bodies of water within the State of Illinois". Copies of these permits may be

found in Filings 42(a) to 42(d) and Filing 55, Exhibits 29-33.

Clear evidence of both Kentucky's failure to continuously assert a claim to the entire breadth of the river, and of the mutual uncertainty that exists regarding the location of the boundary, can also be found in the supplemental documentation submitted by the parties regarding taxation of structures extending from the Illinois shore into the Ohio River. Illinois identified 15 such structures, Filings No. 56-58, but the only such structure taxed by Illinois is the Bunge facility in Alexander County. Filing No. 56, Exhibit 64. County taxing officials in the other five Illinois counties along the Ohio either have no such structures (Pope County), are not taxing them (Pulaski and Massac counties), or are not sure whether these structures are included in the tax base or not (Hardin and Gallatin counties). Filing No. 56, Exhibits 64, 72, 83, 98 and 103.

Kentucky claims that this supports its position regarding acquiescence, but ignores the fact that it has taxed only two of the same fifteen structures, and of those two, a protest is pending in one case based on the taxpayer's belief that the structure is located in Illinois. Filing No. 61, Exhibits 93 and 86-92.

Finally, the Special Master correctly concluded that the evidence submitted, including that of Kentucky's own witness, Dr. Petersen, shows that the dams built on the Ohio River have had the effect of raising the level of the river between Illinois and Kentucky so that the present low-water mark on the Illinois side is farther north than the 1792 low-water mark. See Filing No. 41, Exhibits 1 and 2, Filing No. 44 and Filing No. 61, Exhibit 156.

---



**ARGUMENT****I.**

**PRIOR DECISIONS OF THIS COURT ESTABLISHING THE BOUNDARY BETWEEN THE COMMONWEALTH OF KENTUCKY AND THE STATES OF INDIANA AND OHIO, TO BE THE LOW-WATER MARK ON THE NORTHERLY SIDE OF THE OHIO RIVER AS IT EXISTED IN THE YEAR 1792 ARE CONTROLLING PRECEDENTS ON THE QUESTION OF KENTUCKY'S BOUNDARY WITH ILLINOIS.**

**A.**

The fact that this Court has not considered acquiescence in the context of a case determining the entire boundary of any state bordering with Kentucky on the Ohio River is totally irrelevant to the threshold question, in this or any boundary case, of what is the legal rule to apply in determining the location of the disputed boundary.

Kentucky argues that the Special Master erred in concluding that prior decisions of this Court establishing the boundary between Kentucky and the States of Ohio and Indiana are controlling precedents in determining Kentucky's boundary with Illinois, since those cases did not address the defense of acquiescence, which Kentucky had raised here. This statement, however, demonstrates a basic misunderstanding of the nature of the defense of acquiescence in a boundary dispute.

The essence of the equitable defense of acquiescence is that the rule of law that would otherwise govern a given boundary can only be supplanted if two conditions are met: (1) the continuous assertion of a claim of right to a different boundary on one side; and (2) acquiescence to this claim on the other. *See, e.g., Oklahoma v. Texas*, 272 U.S. 21, 47 (1926).

Kentucky in its First Exception to the Special Master's Report apparently would have the Court accept the idea that its prior decisions are not controlling on the

legal question of Kentucky's Ohio River boundary merely because it has *raised* the defense of acquiescence. In fact, of course, those cases are applicable here and the rule of law they have established can only be avoided if Kentucky *proves* its defense of acquiescence.

### B.

The prior decisions of this Court clearly provide that Kentucky's boundary with the states bordering it along the Ohio River is the low-water mark on the northerly side of the Ohio River as it existed in 1792.

As noted by the Special Master in the opening line of his report to this Court, "It is far too late in the day", *Ohio v. Kentucky*, 444 U.S. 335 (1980), for Kentucky to argue that its boundary with Illinois is the low-water mark as it exists from time to time. The legal issue of Kentucky's Ohio River boundary has been before this Court on four prior occasions, and the result of these decisions is to place Kentucky's boundary at the low-water mark on the northerly shore of the Ohio River as it existed in 1792.

The issue of Kentucky's Ohio River boundary was first addressed by the Court in *Handly's Lessee v. Anthony*, 5 Wheat. (18 U.S.) 374 (1820). In his opinion, Chief Justice Marshall found that this particular boundary was not to be resolved by the general rule that the territory of each state bordering a river extends to the middle of the stream. Instead, after reviewing the historical background leading to Kentucky's statehood, and in particular the Virginia Cession of 1793, the Chief Justice concluded that the entire river up to the northern low-water mark was within the boundary of Kentucky when it became a state in 1792.

The Court next addressed the issue of Kentucky's Ohio River boundary in *Indiana v. Kentucky*, 136 U.S. 479 (1890). It is significant to note, in light of Kentucky's present defenses of acquiescence and laches, that one

hundred years ago Kentucky argued that her boundary with Indiana should be determined, not by the low-water mark as it exists from time to time, but by the low-water mark as it existed in 1792.

In considering the facts of the case then before it, the Court in *Indiana v. Kentucky* observed that as of 1890 the land in dispute was separated from the Indiana shore by a mere bayou, and that under contemporary conditions it would have seemed preferable to locate the boundary at the existing low-water mark so as to place the disputed territory within Indiana. The Court rejected Indiana's arguments in this regard, however, the adopted Kentucky's position, defining its boundary as the low-water mark as it existed when Kentucky became a state on June 1, 1792.

But the question here is not, as if the point were raised today for the first time, to what State and tract, from its situation, would now be assigned, but whether it was at the time of the cession of the territory to the United States, or more properly when Kentucky became a State separated from the mainland of Indiana by the waters of the Ohio River. \* \* \* If when Kentucky became a State on the 1st of June, 1792, the waters of the Ohio River ran between the tract, known as Green River Island, and the main body of the State of Indiana, her right to it follows from the fact that her jurisdiction extended at that time to low-water mark on the northwest side of the river. *She succeeded to the ancient right and possession of Virginia, and they could not be affected by any subsequent change of the Ohio River* \* \* \*. *Here dominion and jurisdiction continued as they existed at the time she was admitted into the Union, unaffected by the action of the forces of nature upon the course of the river.*

*Id.* at 508. Emphasis added.

Subsequent to *Indiana v. Kentucky*, this Court has twice reiterated its position adopting the northern 1792 low-water mark as Kentucky's Ohio River boundary. In

*Henderson Bridge Co. v. Henderson City*, 173 U.S. 592 (1899), the issue was the authority of a Kentucky municipality to tax a railroad bridge built across the Ohio River to the Indiana shore. The Court found in favor of the city, relying on the fact that since Kentucky's own boundary was the low-water mark on the Indiana shore, it could properly bestow the same boundary on one of its municipalities. The Court based its conclusion regarding the location of Kentucky's boundary on its recent decision in *Indiana v. Kentucky*, describing that earlier decision in the following language:

Referring to the channel of the Ohio River as it was when Kentucky was admitted to the Union, the court stated its conclusion to be that 'the jurisdiction of Kentucky at that time extended, and every since has extended, to what was then low-water mark on the north side of that channel'.

*Id.* at 613.

*Ohio v. Kentucky*, 444 U.S. 335 (1980), is the latest decision of the Court dealing with the location of Kentucky's Ohio River boundary. Just as in this case, Kentucky there rejected the position it had taken in *Indiana v. Kentucky*, placing its boundary at the 1792 low-water mark, and instead sought to claim the current low-water mark. The Court, however, rejected Kentucky's attempt to ignore that earlier decision and its historical foundation, and adopted the recommendation of the Special Master placing Kentucky's entire boundary with Ohio at the 1792 low-mark.<sup>1</sup>

The fact that *Indiana v. Kentucky* concerned a portion of the Ohio River in its Indiana-Kentucky segment, rather than a portion of its

---

<sup>1</sup> The location of Kentucky's boundary with Indiana was resolved on the same basis in *Kentucky v. Indiana*, 474 U.S. 1 (1985).

Ohio-Kentucky segment, is of no possible legal consequence: the applicable principles are the same, and the holding in *Indiana v. Kentucky* has pertinent application and is controlling precedent here.

*Id.* at 339.

As the Special Master correctly found in his Report, this conclusion is equally applicable in the present controversy. Illinois, like Indiana and Ohio, was created from the territory ceded by Virginia to the United States. As a result, this Court's prior determinations of Kentucky's Ohio River boundary in *Indiana v. Kentucky* and *Ohio v. Kentucky* are controlling precedents here. The boundary between Illinois and Kentucky is, therefore, the low-water mark on the northern side of the Ohio River as it existed in 1792.

## II.

THE RECORD DOES NOT SUPPORT KENTUCKY'S AFFIRMATIVE DEFENSES OF ACQUIESCENCE AND LACHES AND, THEREFORE, ILLINOIS' BOUNDARY WITH KENTUCKY IS THE LOW-WATER MARK ON THE ILLINOIS SIDE OF THE OHIO RIVER AS IT EXISTED IN 1792.

In many of the cases previously decided by this Court, the state successfully raising a defense of acquiescence has been able to point to surveys or maps setting out the boundary line it claimed. See, e.g., *Rhode Island v. Massachusetts*, 4 How. (45 U.S.) 591 (1846); *Virginia v. Tennessee*, 148 U.S. 503 (1893); and *Maryland v. West Virginia*, 217 U.S. 1 (1910). As the Court observed in *Virginia v. Tennessee*, *supra* at 522, "a boundary line between States \* \* \* located and marked upon the earth, and afterwards recognized and acquiesced in by the parties for a long course of years is conclusive".

In the present case, however, there is no such survey or map that Kentucky can point to in support of its position that its boundary is the current low-water mark



or shore. On the contrary, the existing cartographic evidence clearly supports Illinois. As noted by the Special Master, the Illinois/Kentucky boundary is shown on a series of 22 maps, known as quads, produced by the U.S. Geological Survey (U.S.G.S.). Report of Special Master at 16-17. The boundary depicted on these quads represents the position of the low-water mark as determined by a U.S. Army Corps of Engineers' survey of the Ohio River conducted near the turn of the century, prior to the construction of dams on the river. Filing No. 41, Exhibit 1, pars. 15-30. An examination of these 22 quads discloses that, with the exception of several areas involving former islands now attached to the Illinois shore, the boundary line shown is generally 100 feet or more south of the existing Illinois shore. *Id.* at par. 30. Furthermore, as Kentucky's own witness concedes, the low-water mark derived from the Corps of Engineers' survey, and transferred to the U.S.G.S. quads, is "the most accurate representation of the low-water mark on the north side of the Ohio River". Filing No. 61, Exhibit 156, par. 9. Finally, it should be noted that Kentucky's boundary with Indiana and Ohio was ultimately plotted using this same Corps of Engineers survey data, and it is this same data that Illinois proposes to use to resolve the Illinois/Kentucky boundary. Filing No. 41, Exhibit 1, pars. 15-30.

In addition, Kentucky's defense of acquiescence must be evaluated in light of the fact that Kentucky's Ohio River boundary has previously been before this Court, not once, but four times, and in each of the last three cases the Court unequivocally found that Kentucky's Ohio River boundary was the 1792 low-water mark on the northern shore. No other state has ever attempted to raise the equitable defense of acquiescence to avoid a legal boundary specifically and repeatedly defined by prior decisions of this Court.

The Court has, however, confronted somewhat analogous situations in two cases involving Arkansas' Mississippi boundary: *Arkansas v. Tennessee*, 246 U.S. 158 (1918); and *Arkansas v. Mississippi*, 250 U.S. 39 (1919). The Court



began its opinion in the first case with a thorough recounting of its earlier decision in *Iowa v. Illinois*, 147 U.S. 1 (1893), which laid down the so-called thalweg rule. Under this rule, the boundary between two states separated by a river is the middle of the main navigable channel, not the midpoint between the banks.

Tennessee and Mississippi tried to avoid the application of the thalweg rule by arguing that Arkansas had acquiesced to a boundary marked by a line equidistant from the permanent banks. In support of their position, both states pointed to court opinions from their own courts and those of Arkansas recognizing this line as the boundary.

In both cases, the Court rejected the defense of acquiescence, noting in *Arkansas v. Tennessee*, *supra* at 172 that even the existence of the cases recognizing the line claimed by Tennessee fell "far short" of the showing necessary to establish a defense of acquiescence. In *Arkansas v. Mississippi*, *supra*, the Court went further in elaborating its reasoning for rejecting the defense of acquiescence despite the favorable state case law relied upon by Mississippi:

But whatever may be the effect of these decisions upon local rights of property or the administration of the criminal laws of the State, when the question becomes one of fixing the boundary between States separated by a navigable stream, it was specifically held in *Iowa v. Illinois*, *supra*, followed in later cases, that the controlling consideration is that which preserves to each State equality in the navigation of the river, and that in such instances the boundary line is the middle of the main navigable channel of the river. In *Arkansas v. Tennessee*, *supra*, p. 171, we said: 'The rule thus adopted, [that declared in *Iowa v. Illinois*] known as the rule of the "thalweg", has been treated as set at rest by that decision. *Louisiana v. Mississippi*, 202 U.S. 1, 49; *Washington v. Oregon*, 211 U.S. 127, 134; 214 U.S. 205, 215. . . .'

We are unable to find occasion to depart from this rule because of long acquiescence in enactments and decisions, and the practices of the inhabitants of the disputed territory in recognition of a boundary, which have been given weight in a number of our cases where the true boundary line was difficult to ascertain. (See *Arkansas v. Tennessee*, *supra*, and the cases cited at p. 172.)

*Id.* at 45.

The relevance of this language to the present case is readily apparent. In *Arkansas v. Mississippi*, this Court rejected a defense of acquiescence despite the existence of case law in both states recognizing the boundary that Mississippi claimed, and it did so because the true boundary was *not* "difficult to ascertain" as a result of the general rule it had earlier set out in *Iowa v. Illinois*.

In the present case, not only is there no case or other document of any kind in either state adopting the boundary claimed by Kentucky, there are also three prior decisions of this Court over the past 100 years specifically involving Kentucky's Ohio River boundary and finding that special historical considerations place that boundary at the 1792 low-water mark. As a result, Kentucky's defense of acquiescence must fail.

#### A.

**Kentucky has failed to meet its burden of establishing its affirmative defense of acquiescence.**

As previously noted, a party claiming the benefit of the equitable defense of acquiescence must demonstrate two things: (1) a long and continuous assertion of a claim of right on its side; and (2) acquiescence therein by the other side. See, e.g., *Oklahoma v. Texas*, 272 U.S. 21, 47 (1926). After a thorough examination of the record here, the Special Master concluded that "it seems abundantly clear that Kentucky has not demonstrated a continuous assertion of right in favor of the boundary it has claimed in this litigation." Report of Special Master at 12.

- (1) Kentucky sources have consistently recognized the 1792 low-water mark as Kentucky's boundary.

As the Special Master noted, his conclusion that Kentucky has failed to meet its burden is amply supported by the fact that since at least the time of *Indiana v. Kentucky*, there are official statements from all three branches of Kentucky government acknowledging Kentucky's Ohio River boundary to be the northern low-water mark as it existed in 1792. The existence and significance of these sources was in fact commented upon in *Ohio v. Kentucky*, *supra*, where the Court noted that "it is of no little interest that Kentucky sources themselves, in recent years, have made reference to the 1792 low-water mark as the boundary." *Id.* 444 U.S. at 340-341.

**a. Kentucky Attorney General's Opinion.**

One such source is Opinion Number OAG 63-847 issued by the Attorney General of Kentucky on September 13, 1963. The opinion was written in response to a request from the Kentucky Department of Fish and Wildlife Resources for a declaration as to the location of Kentucky's Ohio River boundary. The attorney general's response is clear and unequivocal:

The law, of course, is that the boundary line between the states of Indiana and Kentucky is the low-water mark on the north shore of the Ohio as it existed when Kentucky became a state in 1792. *State of Indiana v. Commonwealth of Kentucky*, 10 S. Ct. 1051, 136 U.S. 479, 34 L. Ed. 329 (1889).

Filing No. 12(i) at 1. Attorney General Breckinridge also pointed out that "the old low-water mark does not under present water level conditions extend right to the Indiana shore", *id.* at 2, since dams built on the river had raised the water level.

Kentucky argues that this Opinion is advisory only and, therefore, does not constitute binding authority

regarding the location of the Illinois-Kentucky boundary. This argument misses the point. The Opinion is not cited as authority for the proposition that the 1792 low-water mark is the boundary. Sufficient precedent for that proposition exists in decisions of this Court.

Rather, the Opinion of the Kentucky Attorney General was cited by Illinois and accepted by the Special Master as unequivocal evidence that Kentucky has *not* continuously asserted its boundary along the Ohio to be the low-water mark as it exists from time to time. The question whether that Opinion is advisory or not is irrelevant in this context.

Kentucky also argues that the Attorney General's Opinion erroneously construed *Indiana v. Kentucky*. This too is irrelevant. The fact remains that in this Opinion the Kentucky Attorney General asserted a position plainly at odds with Kentucky's current position regarding its supposedly continuous claim to the low-water mark as it exists from time to time. In addition, Kentucky's assertion that Attorney General Breckinridge misconstrued *Indiana v. Kentucky* will not stand up to scrutiny, since his interpretation of that case is precisely the interpretation applied by this Court in *Ohio v. Kentucky*.

#### **b. Bulletins of Kentucky Legislative Research Commission.**

Attorney General Breckinridge's understanding of the meaning of *Indiana v. Kentucky* was not an isolated incident. As the Special Master has noted, there are also documents from the legislative branch of Kentucky government which are plainly at odds with Kentucky's position here. The first of these is Informational Bulletin No. 81 issued by the Legislative Research Commission of the Kentucky General Assembly, and dated December, 1969. Filing No. 12(b). The Forward to this document relates that it is the result of the work of the subcommittee on the Ohio River Boundary, formed in 1966 to study the boundary problem as a result of 150 years of recurring

litigation on that issue. The authors also acknowledge that the final resolution of the boundary issue must be made by this Court. As the Special Master observed, these remarks are inconsistent with Kentucky's claim to have continuously asserted the low-water mark as it exists from time to time as its boundary.

Furthermore, in its summary of prior litigation set out in Chapter II, the Legislative Reference Commission has this to say about *Indiana v. Kentucky*:

In *Indiana v. Kentucky*, 136 U.S. 479 (1890) the Supreme Court was confronted with a dispute as to the ownership of Green River Island which at the time of the suit was located on the north side of the Ohio River. In finding that at the time when Kentucky became a state, the low-water mark of the river was north of the island, the Court determined that the boundary between states of Indiana and Kentucky was the low-water mark on the Ohio River as the mark existed in the year of 1792.

Informational Bulletin No. 81, Filing 12(b) at 18. Emphasis added. Certainly, the Legislative Research Commission did not view *Indiana v. Kentucky* in the limited fashion in which Kentucky now claims to view it.

Additional evidence of Kentucky's acknowledgment of the 1792 low-water mark can be found in Informational Bulletin No. 93 issued by the Kentucky Legislative Research Commission in December, 1972. Filing No. 12(a). This document also addresses the issue of Kentucky's Ohio River boundary and in doing so offers the same interpretation of *Indiana v. Kentucky* found in Informational Bulletin No. 81 and Attorney General Opinion No. OAG 63-847. "Kentucky's North and Western boundary, to-wit, the low water mark on the North shore of the Ohio River as of 1792 has been recognized as the boundary based upon the fact that Kentucky was created from what was then Virginia." Bulletin No. 93, Filing 12(a) at 3. Emphasis added.

Furthermore, as the Special Master recognized, it is clear that the authors of Bulletin No. 93 were aware of the



consequences to Kentucky of adherence to the 1792 line since they noted that "and conceivably there could be places \* \* \* where a state on the north shore of the Ohio River may have a true boundary that extends as much as 100 yards or more into the stream." Bulletin No. 93, Filing No. 12(a) at 4.

Kentucky again attacks these documents as it does Opinion OAG 63-847, claiming they "do not and cannot represent the sovereign position of the Commonwealth". Once again, this argument misses the point. Like the Opinion of the Kentucky Attorney General, these documents are proof that Kentucky has not continuously asserted its boundary along the Ohio to be the low-water mark as it exists from time to time.

### c. Kentucky case law.

Finally, as the Special Master has pointed out, the decisions of Kentucky's courts also provide no support for its position here. The most damaging of these from Kentucky's perspective is the decision in *Perks v. McCracken*, 169 Ky. 590 (1916). That case involved a dispute over the ownership of a towhead in the Ohio River near Mound City, Illinois. Since the plaintiff traced his title to a patent issued by Kentucky in 1854, the Kentucky court concluded that the case would be resolved on the question whether the towhead was part of Kentucky or Illinois. In order to resolve that question, the court turned to *Indiana v. Kentucky* and, applying that precedent to the case before it, concluded that the issue was "where was the low-water mark at the time Kentucky became a state, and does the island in question lie between the low-water mark as it then existed and the Kentucky shore? If so it is part of Kentucky." *Id.* at 591.

Kentucky attempts to distinguish this case by arguing that the rule in *Indiana v. Kentucky* was limited to islands, and since an island was at issue in *Perks v. McCracken*, the latter has no precedential value here. It is sufficient response to note that this Court in *Ohio v.*



Kentucky obviously disagreed with Kentucky's limited interpretation of *Indiana v. Kentucky*, since it applied the rule of law set out there to locate Kentucky's entire boundary with Ohio and Indiana. Furthermore, there is nothing in the language of *Perks v. McCracken* to suggest that the Kentucky court understood *Indiana v. Kentucky* to be so limited. As a result, *Perks v. McCracken* stands as another, prominent instance in which Kentucky did not assert the boundary it now claims.

As the Special Master points out at pages 18-19 of his Report, there are also many other Kentucky cases which discuss Kentucky's Ohio River boundary as being located at the low-water mark. Although none of these cases describes that mark as the one existing in 1792, it is also true that not a single one of them defines the boundary in the manner Kentucky now claims - as the low-water mark that exists from time to time. Thus, although not direct support for the 1792 line itself, as is *Perks v. McCracken*, these cases plainly do not support Kentucky's position either.

2. Kentucky's evidence does not support its claim to have continuously asserted a boundary identified by the low-water mark as it exists from time to time.
  - a. Testimony of Kentucky law enforcement officers.

In that part of its Exceptions to the Report of the Special Master dealing with the testimony of its law enforcement officers, Kentucky seeks to gloss over the uncertainty and contradictions reflected there and says that the record shows that these individuals enforced Kentucky fish and game laws up to "the Illinois shore", attempting apparently to equate "the shore" with "the low-water mark as it exists from time to time".

Former Water Patrol Officer Storms, for example, first described the boundary as "the waterline, high water-mark or low water-mark", and then settled on "low

water-mark". Filing No. 23(a) at 7. When asked whether the boundary changed with the level of the river, he replied, "It never changed the boundary as far as I know." Filing No. 23(a) at 7-8. On re-cross examination Mr. Storm in fact testified that in his mind low-water mark and shoreline are the same thing. Filing No. 23(a) at 16-17.

Captain David Loveless of the Kentucky Department of Fish and Wildlife's Division of Law Enforcement, testified that his understanding of the location of the boundary was "the normal standing pool of the Ohio River". Filing No. 23(c) at 7. Later, on cross-examination, when asked to relate standing pool to the low-water mark, he responded that "standing pool would probably be the low-water mark". Filing No. 23(c) at 15-16. When asked if there was anything in writing setting out his Department's position regarding the boundary, he replied that there was none, and that it was a matter of oral tradition. Filing No. 23(c) at 7-8.

The third law enforcement officer to testify was Steven Owens. He stated his understanding of the boundary to be the "water edge of the northern shore". Filing No. 23(d) at 5-6. When asked for the source of his opinion as to the boundary's location, he replied, "I'm not exactly sure. It's just - its always been the policy that was handed down to me, and I understand that that's the way the Constitution read." Filing No. 23(d) at 6.

The final law enforcement officer deposed was David Jenkins, who stated that in his understanding, the boundary on the Ohio was the point where the water touches the bank. Filing No. 26 at 5. Like the other Kentucky law enforcement officers, he was unable to point to any authority for his opinion, saying simply, "You know, prior to me, everybody knows that the Ohio River is Kentucky." Filing No. 26 at 6.

Illinois submits that this last remark sums up the essence of Kentucky's argument regarding its claim in this litigation. "Everybody knows" Kentucky has always claimed the low-water mark as it exists from time to time,

despite the fact that there is not a single witness, document or judicial decision Kentucky can point to which substantiates this claim.

Certainly none of the law enforcement officers described the boundary in anything like the terms Kentucky asserts here. In fact, only Mr. Storms mentioned a low-water mark at all without prodding from counsel, and he plainly was not sure whether the boundary was really marked by the high-water mark or low-water mark.

It is in the context of seeking to fit this testimony into its theory of the case that Kentucky confuses the question of what in fact constitutes the low-water mark. Kentucky must describe the boundary it claims in this case in terms of the low-water mark because the cases of this Court dealing with Kentucky's Ohio River boundary, beginning with *Handly's Lessee v. Anthony*, *supra*, have all defined that boundary to be the northern low-water mark. Kentucky's suggestions, that statements placing the boundary at the water's edge, the shore or the standing pool are the equivalent of asserting the low-water mark as it exists from time to time are, however, completely unsubstantiated.

There is one other basic problem with Kentucky's reliance on the testimony of its four law enforcement officers. If "everybody knows" that Kentucky has "always" claimed the low-water mark as it appears from time to time to be its boundary, how did the Kentucky Legislative Research Commission's Informational Bulletins Nos. 81 and 93, Attorney General Opinion OAG 63-847, and *Perks v. McCracken* come to be written? It seems inconceivable that this supposedly open and continuous claim of right was overlooked by a legislative commission specifically created to study the Ohio River boundary, as well as Kentucky's Attorney General and the court in *Perks v. McCracken*. At most, the contradictions between the official sources adopting the 1792 line on Kentucky's behalf and the conflicting statements

of these witnesses display a level of uncertainty on Kentucky's part wholly at odds with its defense of acquiescence. See *Oklahoma v. Texas*, 272 U.S. 21 (1926).

**b. Testimony of coroners.**

The testimony of Kentucky's two coroners is even less persuasive from Kentucky's perspective than that of its law enforcement officers. As pointed out by the Special Master, none of the seven drownings described by these individuals was shown to have taken place north of the 1792 low-water line. Report of Special Master at 23-24. Since Illinois acknowledges Kentucky's jurisdiction south of that line, a drowning that cannot be shown to have taken place north of the 1792 low-water mark adds nothing to Kentucky's case.

Kentucky complains in its Exceptions to the Report of the Special Master that it was unfair of the Special Master to reject the evidence of its coroners since the 1792 low-water mark has not been plotted along that part of the river between Illinois and Kentucky. In response to this point, Illinois notes first, that Kentucky acknowledges that it had the burden of demonstrating a continuous claim of right to a boundary other than the 1792 low-water mark. If it chooses to do so by offering evidence of deaths on the Ohio handled by Kentucky coroners, it must be able to prove the deaths occurred in that portion of the river in dispute. If it cannot do so, it has not met its burden of proof.

In addition, it should be pointed out that Illinois has done precisely that which Kentucky said has not been done. Illinois has produced a series of maps depicting the 1792 low-water mark along the Illinois side of the Ohio using precisely the same methods used by Kentucky to resolve her boundaries with Indiana and Ohio.<sup>2</sup> Furthermore, these maps verify that, in those cases where it is

---

<sup>2</sup> Affidavit of William Kreisle (Filing No. 41, Exhibit 1).



possible to identify where the body was recovered, the drownings took place on the Kentucky side of the 1792 line.

In addition to overstating the value of the testimony of its two coroners in its Exceptions to the Special Master's Report, Kentucky also distorts the significance of the testimony of the six Illinois coroners deposed, and the existence of the 214 deaths in the Ohio River handled by Illinois coroners over the past eighty years. While it is certainly true that the Illinois coroners differ in their practices and opinions as to the boundary's location, those very differences reflect uncertainty of a sort incompatible with a finding of acquiescence. Similarly, as the Special Master points out in his Report, the informal, practical accommodations that have existed between various Illinois coroners and their Kentucky counterparts do not constitute evidence of acquiescence since they are not based on a concession of right by either party, but instead are an obvious reflection of mutual uncertainty. In seeking to challenge the Special Master's conclusions in this regard, Kentucky omits pertinent facts from the record and fails to address certain unfavorable conclusions that are inherent in the facts on which it does rely.

For example, in commenting on the statement of Dr. Charles Diekroeger, coroner of Massac County, Illinois, Kentucky correctly notes that he has always called the coroner of McCracken County, Kentucky when a body is found in the river. Filing No. 37 at 7. Kentucky fails to relate, however, that Dr. Diekroeger also testified that he did not know where the Illinois-Kentucky boundary was located, and that a former deputy coroner, Herb Goyert, now deceased, had handled a case involving a body recovered from the Ohio. Filing No. 37 at 7-8.<sup>3</sup>

---

<sup>3</sup> The incident in question is described in Answer 3(239) of Illinois' Supplemental Answers to Defendant's First Set of

In describing the testimony of David W. Barkett, coroner of Alexander County, Illinois, Kentucky says that Mr. Barkett would take jurisdiction over a body if it were located on Illinois land. Once again, however, this is only part of the story. Mr. Barkett also testified that he had handled three or four drownings in the Ohio. Filing No. 36 at 5-6. More significantly, in one incident involving the death of Leslie Kerr, the body was found in the river and then brought to the Illinois shore, where Mr. Barkett as chief deputy coroner pronounced him dead and took custody of the deceased. Despite the fact that the body was recovered from the water, when Kentucky officials arrived on the scene they agreed the case was properly within Mr. Barkett's jurisdiction. *Id.* at 12-13.

This latter point is particularly important in light of the evidence given by Kentucky's own witness, Mr. Jerry Beyer, coroner of McCracken County, Kentucky. When asked to describe the jurisdiction of his office, he replied that the controlling factor was the point at which the body was recovered. Filing No. 29 at 13. Applying this rule to the incident involving Leslie Kerr, it is clear that under Kentucky's theory of this case the Kentucky authorities should have pressed their claim to jurisdiction over Mr. Kerr's remains, since his body was recovered in the river.

Kentucky also makes much of the testimony of Granville Brownfield, long-time coroner of Hardin County, Illinois. As Kentucky correctly points out, Mr. Brownfield stated that in each of the deaths occurring near the Hardin County, Illinois shore during his tenure, he has taken custody of the body only after obtaining approval from the coroner for the Kentucky county across the river. Filing No. 45 at 5. Kentucky fails to comment, however,

---

(Continued from previous page)

Written Interrogatories, Filing No. 31, and the accompanying death certificate may be found at page 160 of Exhibit 9 to Plaintiff's Motion for Summary Judgment. Filing No. 41.



on the fact that the Kentucky coroner never in fact took jurisdiction over a single one of these incidents, *id.* at 13-14, or that Mr. Brownfield could only recall the Kentucky coroner coming to the scene in two of the five incidents he recounted. *Id.* at 11 and 13. In fact, in the most recent case handled by Mr. Brownfield, the body of the deceased was in the river at the time the Kentucky coroner arrived, and despite this fact, he once again agreed that Mr. Brownfield should handle the case. *Id.* at 13.

While admittedly unusual, this arrangement between Mr. Brownfield and his Kentucky colleague does not support Kentucky's theory of acquiescence. If the Kentucky coroner truly believes his jurisdiction covers the entire breadth of the Ohio River, under what authority does he delegate this jurisdiction to an Illinois coroner? Kentucky offers no answer to this question.

The final Illinois coroners discussed by Kentucky are A. C. and Charles Cox, a father and son, who together have served as coroner for Gallatin County, Illinois for over sixteen years. Filing No. 34 at 4 and Filing No. 46 at 3. Mr. A. C. Cox related that he and his Kentucky counterpart had reached an informal understanding whereby each was responsible for the remains of residents of their own states found in the Ohio River. Filing No. 34 at 5. Mr. Cox recalled one incident, in fact, in which he was called upon to drive to Uniontown, Kentucky to recover the bodies of three Gallatin County, Illinois residents that had been recovered from the river. *Id.* at 12.

As the Special Master concluded, this arrangement, like that of Mr. Brownfield and his Kentucky colleague, was based not on any concession of right that would support a finding of acquiescence, but rather on mutual uncertainty. This conclusion is buttressed by the fact that when asked his understanding of the location of the boundary, Mr. Cox replied, "whether it's a high water

line or a low water line, I don't know. That's what nobody knows." *Id.* at 7.

Charles A. Cox, the present coroner of Gallatin County, recalled only one drowning in the Ohio River during his time in office. Piling No. 46 at 4. The details of this one incident are of some significance, however, since it marked the end of the arrangement between the Gallatin County coroner and his colleague in Kentucky previously described by A. C. Cox.

On the day of the incident in question, Mr. Cox had gone to the bank of the river near Shawneetown, Illinois in response to a call that a man had jumped into the Ohio River. He testified about having a brief conversation with the Union County, Kentucky coroner during which the latter confirmed that in keeping with the prior understanding between their offices Mr. Cox should handle the case, since the victim was an Illinois resident. *Id.* at 4-5.

When the body was finally recovered and brought to the Illinois shore, however, the Union County coroner and a Kentucky State Trooper appeared and demanded custody of the body. Mr. Cox testified that he did relinquish the body to the Kentucky authorities, but *not*, as Kentucky suggests, because he acknowledges Kentucky's jurisdiction over all bodies recovered in the Ohio River. Instead, his decision was based, first, on the fact that he did not have time to seek the legal advice of his county's state's attorney. In addition, he stated that he did not wish to leave the body lying on the bank with the relatives standing by while he engaged in a dispute over custody of the deceased with the Kentucky coroner and an increasingly belligerent Kentucky State Trooper. *Id.* at 4-6.

Mr. Cox's reasoning and decision demonstrated common sense and compassion. In no way, however, did they reflect acquiescence to Kentucky's claim to jurisdiction over the entire river. Had he agreed with that claim, there would have been no need to consult his county state's

attorney as, he testified, that he had wished to do. This conclusion is supported by his personal uncertainty as to the location of the boundary.

Well, the way I've always been told was something to do - it was either a high water mark or a low water mark. \* \* \* Back in the late 1700's - well, my gosh, you know, the river has gotten a lot larger since then, and how you going to tell where that mark is. In all reality, I'm sure that water line is probably way out into the river somewhere by now, but I don't know how we would ever determine that.

*Id.* at 6-7.

In fact, as the recent resolution of Kentucky's boundary disputes with Indiana and Ohio demonstrates, it is possible to locate the 1792 low-water mark to the satisfaction of the parties.<sup>4</sup> Absent such formal agreements locating the boundary, however, local officials in both states are left to work out practical accommodations of the sort described by the Callatin and Hardin County, Illinois coroners. Such accommodations do not demonstrate acquiescence since they are not based on an acknowledged claim of right, but on mutual uncertainty.

#### c. Testimony of Coast Guard officers.

In addition to the law enforcement officers and coroners whose testimony has already been discussed, Kentucky also identified as witnesses two former commanding officers of the U.S. Coast Guard Maritime Safety Station on the Ohio River at Paducah, Kentucky. Kentucky describes their testimony regarding several incidents on the river as demonstrating "typical" examples of "Illinois recognition that Kentucky's boundary is

---

<sup>4</sup> See Kreisle Affidavit, Filing No. 41, Exhibit 1, at pars. 22-25; Report of Special Master, No. 27 Original, adopted at 471 U.S. 153 (1985); and Report of Special Master, No. 81 Original, adopted at 474 U.S. 1 (1985).

the northwestern shore as it exists from time to time." Exceptions at 25.

The first point to note in responding to this claim on Kentucky's part is that it has once again substituted northwestern "shore" for "low-water mark". This imprecise use of terminology demonstrates yet again that Kentucky's position here is not the reflection of a clearly articulated, continuous claim of right to a boundary other than the 1792 low-water mark. It is, instead, an attempt to fit unrelated and sometimes divergent facts into a theory enunciated only in this litigation.

The first of the two Coast Guard officers deposed was John L. Bailey, commanding officer of the U.S. Coast Guard's Paducah Maritime Safety Station from 1976 to 1981. Filing 23(b) at 4-5. Commander Bailey was identified as a witness with knowledge of an incident involving a strike at a coal loading facility on the Illinois shore. According to Kentucky's response, the Coast Guard and Kentucky State Troopers dealt with the situation because "Illinois acknowledged it had no authority on the river". Filing No. 11 at 5 and Filing No. 17 at 2. The facts as related by Commander Bailey were significantly different, however.

Cmdr. Bailey recalled being contacted by "some official's office in Illinois" to prevent strikers from entering the facility from the Ohio River side. To accomplish this, he declared a safety or security zone in the area, which gave him authority to control access. Filing 23(b) at 5.

Although Cmdr. Bailey committed several vessels and significant personnel to this assignment, he remembered expressing concern to law enforcement officers from both states about the safety of his personnel, since none of them had law enforcement experience. *Id.* at 8-9. Contrary to Kentucky's statement in its response to Illinois' interrogatory, however, this concern did not result in any Kentucky law enforcement personnel joining Coast Guard personnel in the small boats used to enforce the

safety or security zone. Instead, it was Illinois' State Troopers who manned the small boat patrol with Cmdr. Bailey's personnel. *Id.* at 8-10 and 18-19.

It is true that Cmdr. Bailey recalled the officer in charge of the Illinois State Police contingent assigned to the strike to have expressed the belief that he had no authority on the Ohio River. *Id.* at 8 and 12. The effect of this remark was more than counteracted, however, both by the action of Illinois officials in placing Illinois officers on the river and by Kentucky's failure to object to their presence. Had Kentucky officials felt that the presence of Illinois officers on "their" river was an infringement upon their jurisdiction, they had the opportunity to object and insist that Kentucky officers be substituted. The record discloses no such action on their part.

Kentucky also discussed the testimony of Coast Guard Captain Thomas Robinson, and in particular his account of the sinking of the towboat *Bayou Cauba*. Although Capt. Robinson stated that the Golconda, Illinois Volunteer Fire Department was "unwilling" to assist in putting out a fire on the boat, he also noted that it felt it did not have the expertise to do so. Filing No. 25 at 7. This latter fact significantly reduces whatever value Kentucky might have derived from this incident.

One final and relevant aspect of the testimony of these two witnesses not remarked upon by Kentucky was their understanding of the location of Kentucky's Ohio River boundary. Cmdr. Bailey, like the majority of the witnesses heard from, was simply uncertain as to its location, saying, "Well, I don't remember what it was, the low water, the pool line, or what line that was, but just the water line on the other side of the river. You know, there are a lot of different water lines that people refer to on the rivers." Filing 23(b) at 15-16. Such uncertainty is



not indicative of a widely known continuous assertion of a claim of right by Kentucky.

Capt. Robinson's testimony regarding the boundary was even less supportive of Kentucky's position. He first correctly identified the line as being marked by the northern low-water mark, and when asked to specify whether that low-water mark was fixed at some point in time, he responded that "It was my understanding that the boundary was fixed by the year in which that decision was made by whatever court made it \* \* \* ." Filing No. 25 at 34.

It is unclear whether Captain Robinson had in mind this Court's 1980 decision in *Ohio v. Kentucky* or its 1890 decision in *Indiana v. Kentucky*. Regardless of which case he had in mind, it is clear that his understanding of the boundary involved a low-water mark fixed at some point in time, and not a low-water mark as it exists from time to time.

## B.

**Illinois has exercised jurisdiction over a portion of the Ohio River throughout its history and, thus, has not acquiesced to the boundary claimed by Kentucky in this case.**

Illinois believes the Special Master is clearly correct in his conclusion that Kentucky has failed to demonstrate a continuous claim of right to the boundary it now asserts in this case. As the Special Master also found, however, even if it is assumed for the purpose of argument that Kentucky has met this burden, the record does not support a finding that Illinois has acquiesced to a boundary other than the 1792 low-water mark.



- (1) **Illinois sources relied upon by Kentucky do not demonstrate acquiescence.**

**a. Diers' correspondence.**

In its Exceptions to the Report of the Special Master, Kentucky makes much of two letters written in September of 1954 by H. E. Diers, Assistant Engineer of Maintenance for the Illinois Department of Public Works and Buildings. In one letter addressed to William MacLeod, District Engineer for the Illinois Department of Public Works, Mr. Diers refers to the boundary language contained in the Illinois Constitution of 1870, and states that, "This I believe can be interpreted to mean the shoreline at the mean, normal, water elevation along the Illinois shore." Filing No. 12(m). The second letter addressed to W. J. Crouse, Director of the Division of Maintenance of the Kentucky Department of Highways, contains similar language. Mr. Diers also states there that, "[i]t is possible" that the boundary can be fixed as he suggests and that it "can probably be determined by examination of the gauge readings in the U.S. Engineers' office at Cairo". Filing No. 12(l).

As the Special Master observed, Diers' words reflect uncertainty, rather than clear acquiescence in any claim of right on Kentucky's part. This conclusion is reinforced by the final paragraph of the second letter in which Diers asks the Director of Maintenance of the Kentucky Department of Highways whether he "concur[s] in this method or if he will be kind enough to make a suggestion in regard to the establishment of this state line." If Mr. Diers' letters truly reflected acquiescence to Kentucky's continued claim of right, it would have been unnecessary for him to inquire as to Kentucky's position in this matter.

Despite these problems, Kentucky asserts that the Diers correspondence "dramatically supports Kentucky's position in this case. It shows: that an Illinois official recognized that Kentucky's jurisdiction over the river

extends to the shoreline at the mean, normal water elevation along the Illinois shore." Exceptions at 29.

First, it is reasonable to ask whether or not Mr. Diers would have considered himself as a "state official" undertaking to actually establish by his action Illinois' boundary with the state of Kentucky. As the Special Master notes, it is much more reasonable to conclude that the purpose of Mr. Diers' correspondence "was not to locate the state boundary precisely, but simply to place a sign on the bridge somewhere near the approximate state line to alert motorists that they were entering or leaving Kentucky or Illinois." Report of Special Master at 26.

Although Kentucky disputes such a mundane meaning for this "dramatic" evidence, the Special Master's determination is further supported by an additional item in the record which Kentucky fails to mention. This document is the response from Mr. MacLeod, the Illinois district engineer responsible for the Cairo bridge, to Mr. Diers' September 28, 1954 letter. In this response, dated October 5, 1954, Mr. MacLeod states that the Illinois state line is shown on the plans for the Ohio River bridge at Cairo, and that in his opinion "the State line shown on the Ohio River Bridge plans is close enough to the theoretical State line that it will be unnecessary to confer with the Department of Highways of Kentucky". Filing No. 41, Exhibit 12. Emphasis added.

#### **b. Bridge agreements.**

In addition to the Diers correspondence, Kentucky also relies on evidence submitted regarding bridge maintenance agreements supposedly demonstrating acquiescence on the part of Illinois. Filing No. 61, Exhibits 53, 61, 64, 66a. Illinois believes these documents are equivocal at best, and do not support Kentucky's claim of acquiescence. In support of its conclusion, Illinois relies upon the response of Special Master Judge VanPelt in his report of January 3, 1979 in *Ohio v. Kentucky*, No. 27, Original.

There, Judge VanPelt was offered similar evidence regarding bridge agreements which Kentucky proposed to offer as evidence of acquiescence to a line other than the 1792 low-water mark. In rejecting this offer of evidence on Kentucky's part, Judge VanPelt said:

Your Special Master concludes that it would not be a benefit to take evidence involving the bridge contracts. Undoubtedly an agreement as to the boundary was made merely to expedite and facilitate the construction of bridges. At approximately the same time as these contracts were being executed there were the Kentucky legal opinions above mentioned recognizing the 1792 boundary. Your Special Master prefers to rely on the previous cases in this Court rather than bridge agreements.

Report of Special Master, No. 27, Original, January 3, 1979, pp. 13-14.<sup>5</sup>

### c. Former Illinois Constitutions.

Kentucky also argues that the boundary description contained in the Illinois Constitutions of 1818, 1848 and 1870 supports this case. All three documents describe Illinois' boundary with Kentucky on the Ohio River as running "along its northwestern shore". Illinois Constitution of 1818, Introduction; Illinois Constitution of 1848, art. I; and Illinois Constitution of 1870, art. I.<sup>6</sup>

According to Kentucky this language supports its theory that Illinois has acquiesced to the use of the general term "low-water mark along its northwestern shore", and that this term means the low-water mark as it exists

---

<sup>5</sup> A copy of the Special Master's Report can be found in the Record as Filing 41, Exhibit 11.

<sup>6</sup> Copies of the boundary provisions of the Illinois Constitutions of 1818, 1848 and 1870 are included in the Record as Filing No. 41, Exhibit 13.

from time to time, rather than the 1792 low-water mark. This claim is inexplicable.

As the Special Master noted, the boundary language incorporated into the three prior Illinois Constitutions is merely a verbatim recitation of the language used by Congress to describe Illinois' boundaries in its Enabling Act of April 18, 1818, 3 Stat. 428 (1818). Filing No. 41, Exhibit 14. Given this fact, the language in question cannot conceivably be said to demonstrate acquiescence as claimed by Kentucky. Acquiescence is an equitable doctrine that recognizes the state's acceptance of a boundary different than that which the law would otherwise recognize. Here, the Illinois constitutional provisions adopted precisely the boundary which was provided by Congress in creating the State of Illinois, and as the Special Master points out, there is nothing in the record to suggest Congress meant Illinois' boundary with Kentucky to be any different than that of Indiana or Ohio, "to wit, the low-water mark as it existed in 1792". Report of Special Master at 28.

#### d. *The Geography of Illinois.*

Kentucky also continues to rely on the *Geography of Illinois*, written by Douglas C. Ridgely, and published in 1921 as support for its defense of acquiescence. That book, in the section entitled *Legal State Boundary*, identifies Illinois' southern boundary as being located "along the northwest shore of the Ohio River", and then concludes that "It thus happens that the Ohio River and its islands are in Kentucky, not in Illinois, Indiana, or Ohio."

First of all, Illinois obviously agrees with the Special Master's conclusion that as a work of private scholarship this obscure text is not binding on the State of Illinois in this case. Kentucky argues, on the other hand, that it is admissible to show "reputation in the community".

Even if Kentucky is correct in this point, its reliance on this forgotten work is misplaced since the author's

meaning is anything but clear. If, for example, the above passage is interpreted simply to mean that all islands in existence when Kentucky became a state in 1792 belong to Kentucky, then this passage in no way conflicts with Illinois' position in this case, since any island existing in 1792 would have been south of the 1792 low-water mark. See *Handly's Lessee v. Anthony*, *supra* at 380.

**e. Report of Joint Select Committee.**

Finally, Kentucky seeks to rely on a document entitled "Report of the Joint Select Committee Appointed to Investigate the Nature and Extent of the Jurisdiction of Illinois Over the Ohio River" as evidence of acquiescence on the part of Illinois. Filing No. 12(h). This report was submitted by the committee to the Illinois legislature on January 25, 1849. The report begins by stating that "It is conceded that the Ohio river to low water mark is included within the limits of the state of Kentucky." Report of Joint Select Committee, Filing No. 49(e) at 1.

Illinois concedes as much today. The boundary between Illinois and Kentucky is the low-water mark, and neither party to this litigation disputes that basic premise. The point of contention concerns the time at which that low-water mark is to be determined. While the statement just quoted does not specifically claim the 1792 low-water mark, it also does not acknowledge the low-water mark "as it exists from time to time".

**2. Illinois has asserted authority over a portion of the Ohio River.**

**a. Illinois case law.**

The first Illinois decision to address the boundary question is *Ensminger v. People*, 47 Ill. 384 (1868). Like most of the cases in Kentucky courts addressing the subject of the Ohio River boundary, however, the *Ensminger* case is of limited value in resolving the present



controversy. It merely identifies the Illinois-Kentucky boundary as being the low-water mark on the Illinois shore without any discussion of the point in time at which that low-water mark is to be determined. The Illinois Supreme Court's silence on this point, however, does not support Kentucky's claim of acquiescence.

In *Union Bridge Co. v. Industrial Commission*, 287 Ill. 396 (1919), the issue was whether the Illinois Industrial Commission had jurisdiction over an accident which took place on a bridge pier being constructed in the Ohio River. The court concluded that since the facts established that the accident took place 1,185 feet south of the low-water mark, it was outside the jurisdiction of Illinois.

Unfortunately, the opinion is silent as to how the court determined the location of the low-water mark, and this decision is, like *Ensminger*, therefore of limited value here. All that can safely be said is that it does not support Kentucky's claim of acquiescence to the low-water mark as it exists from time to time.

The most significant Illinois decision involving the Ohio River boundary is undoubtedly *Joyce-Watkins Co. v. Industrial Commission*, 325 Ill. 378 (1927). This case once again involved the question whether the Illinois Industrial Commission had jurisdiction over an accident which took place on or over the Ohio River. The injury took place at a point roughly 8-10 feet from the water's edge on a railroad incline that extended approximately 260 feet into the river from the Illinois shore.

In rejecting the employer's argument that the accident occurred outside the boundaries of the State of Illinois, the court began by citing *Indiana v. Kentucky* for the proposition that Illinois' boundary with Kentucky was the low-water mark on the northwest shore of the Ohio River. The court then noted, however, that no commission had ever been appointed to determine the location of that line, and that it was not appropriate to ascertain the actual boundary in the case before it.



The court was nonetheless able to resolve the dispute without locating the precise boundary because of its conclusion that the phrase "low-water mark" when used to define a boundary meant "the point to which the waters at that river have receded at its lowest stage". *Id.* at 383. Because of this interpretation, the court did not need to ascertain the precise location of the boundary as it existed on the day of the accident, but had only to determine if the low-water mark at the point in question had ever been south of the place of injury. Evidence in the record established that the Ohio River had on occasion retreated past the end of the railroad incline, which on the date of the accident extended approximately 260 feet into the river. As a result, the court concluded that the low-water mark had at one time existed approximately 250 feet south of the injury, and that the accident had therefore occurred within the boundaries of the State of Illinois.

Kentucky in its Exceptions notes that both Illinois and the Special Master's Report place heavy reliance on the *Joyce-Watkins* decision. In discussing this case, however, Kentucky notes only that the court recognized that the low-water mark was not a "definitely fixed boundary" but one that would move over time. The remark fails, however, to comment on the most important aspect of the *Joyce-Watkins* decision. While the Illinois Supreme Court did contemplate a moving boundary, it is obvious, as the Special Master observed, that the movement envisioned by the court would be exclusively in favor of Illinois as each record drought would move the boundary further southward. Once the low-water mark retreated to a given level at a particular point along the river, it would never again move higher or northward. Rather than demonstrating acquiescence to the boundary Kentucky claims in this litigation, the *Joyce-Watkins* decision stands for a claim to a boundary more favorable than the 1792 line. Subsequently, the rule set out in the *Joyce-Watkins* decision was cited for nearly 50 years by the judicial and

executive branches of Illinois government. See the Opinion of Illinois Attorney General William G. Clark issued September 18, 1961, 1961 Ill. Att'y Gen. Op. 215, Filing No. 10(f), two letters written by the Illinois Department of Revenue on July 24, 1944 and August 22, 1946, Filing No. 41, Exhibit 18, and the decision of the Illinois Appellate Court in *People ex rel. Scott v. Dravo Corp.*, 10 Ill. App. 3d 944 (1973).

Although Illinois acknowledges that the *Joyce-Watkins* case misapplied the holding in *Indiana v. Kentucky*, the continued adherence by Illinois authorities to this rule from 1927 through 1973 directly refutes Kentucky's claim that Illinois acquiesced to a boundary represented by the low-water mark as it exists from time to time. In fact, if one were to apply Kentucky's theory of acquiescence in this case to the period of 1927 to 1973, it could be argued that Kentucky's failure to bring an original action against Illinois in light of the *Joyce-Watkins* decision constituted acquiescence by Kentucky to the definition of the low-water line set forth in that case. Illinois does not make this claim, however, because it recognizes that the 1792 low-water mark is binding on Kentucky and the three states bordering her to the north, including Illinois. Illinois' acceptance of this fact is reflected in Opinion No. 80-041, issued by Attorney General Fahner of Illinois on December 10, 1980. 1980 Ill. Att'y Gen. Op. 149, Filing No. 41, Exhibit 19.

#### **b. Illinois legislative and executive actions.**

Additional evidence of Illinois' assertion of jurisdiction over a portion of the Ohio River can be found in legislation adopted by the Illinois General Assembly and enforcement of these statutory provisions by the executive branch of Illinois government. One example of such legislation is a statute enacted by the Illinois legislature on June 10, 1897, making it unlawful "to occupy any boat or other water craft upon the Ohio, Mississippi, Wabash, Illinois, or other navigable river, lake or other course,

*within this State* \* \* \* without first obtaining \* \* \* a license." Laws of Illinois 1897, p. 248, Filing No. 10(k). Emphasis added.

Although this statute does not specify that portion of the Ohio River - or for that matter Mississippi, Wabash or Illinois rivers - that is "within this State", it nevertheless constitutes an unequivocal assertion that some portion of each of these rivers, including the Ohio, is within the boundaries of Illinois. Its existence, therefore, refutes Kentucky's allegation that Illinois has never exercised jurisdiction over any portion of the river. This statute remained in effect until January 1, 1962. Filing No. 53 at 2 and Filing No. 55, Exhibit 22. Enclosed with the supplemental material submitted by Illinois were copies of county court documents disclosing prosecutions under this statute for unlawfully occupying shanty boats on the Ohio River without a license. Filing No. 55, Exhibits 23-26.

In addition to these prosecutions under the shanty boat licensing statute, Illinois also submitted copies of documents describing criminal prosecutions of individuals cited for maintaining a house of prostitution on the Ohio River. Filing No. 55, Exhibits 27 and 28. Once again, these prosecutions demonstrate an assertion of authority by the executive branch over the Ohio River pursuant to Illinois legislation.

As the Special Master noted, further evidence of Illinois' assertion of jurisdiction over the Ohio River is found in permits issued by the Illinois Department of Transportation, and its predecessor, the Department of Public Works and Buildings. The permits may, as the Special Master observed, be grouped into five general categories: (1) construction of docks, mooring anchors, access ramps, and other structures built in, on, or over the river; (2) dredging of sand and gravel; (3) bridge construction; (4) bank protection; and (5) sewage and water outlets or inlets.

In its arguments before the Special Master, Kentucky claimed that these permits represented no support for Illinois' position, since they deal only with the development of the Illinois shoreline. In its Exceptions to the Report of the Special Master, Kentucky apparently eschews this particular argument and replaces it simply with the statement that these permits "do not prove that Illinois had not acquiesced to Kentucky's exercise of jurisdiction." Exceptions at 41. Kentucky offers no substantiation whatsoever for this statement.

In fact, as noted by the Special Master, these permits constitute a very strong point in favor of Illinois' position. The permits were issued by an agency of the State of Illinois pursuant to "An Act in relation to the regulation of the rivers, lakes and streams of the State of Illinois". Ill. Rev. Stat. 1987, ch. 19, par. 52 et seq. Section 18 of the Act (Ill. Rev. Stat. 1987, ch. 19, par. 65)<sup>7</sup> provides that:

It is unlawful to make any fill or deposit of rock, earth, sand, or other material, or any refuge matter of any kind or description or building or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulk head, jetty, causeway, harbor or mooring facilities for water craft, or build or commence the building of any other structure, or do any work of any kind whatsoever in any of the public bodies of water within the State of Illinois, without first submitting the plans, profiles and specifications therefor and such other data and information as may be required to the Department of Transportation of the State and receiving a permit therefor signed by the Secretary of the Department and authenticated by the seal thereof.

Emphasis added.

---

<sup>7</sup> The statute, including the permit requirement, was first enacted June 10, 1911, and was effective July 1, 1911. (Laws of Illinois 1911, p. 115.)

Copies of the 73 permits issued by the State of Illinois between April 10, 1922 and September 15, 1988 are a part of the record. Filings 42(a) to 42(d) and Filing 55, Exhibits 29-33. As is evident from the examples of these permits cited by the Special Master, many involve structures built a significant distance into the river from the existing Illinois shoreline. Report at 34-36. Others, such as Permit No. 4814, issued to Yourtee-Roberts Sand Company, on February 5, 1941, authorize the applicant to "dredge sand and gravel in that part of the Ohio River within the State of Illinois between the mouth of the river and Metropolis in Massac County, Illinois". Filing 42(a), Exhibit 20, Vol. 1, p. 171. Emphasis added. Although not express assertions of the 1792 low-water mark, these permits directly refute Kentucky's claim that Illinois has never exercised jurisdiction over any part of the river.

Kentucky seeks to avoid the effect of these permits on this litigation by citing this Court's decision in *New Jersey v. Delaware*, 291 U.S. 361 (1934). In that case, the two states disputed their boundary over a portion of the Delaware River. Delaware claimed that its jurisdiction extended to the low-water mark on the eastern or New Jersey side of the river, while New Jersey claimed to the middle of the main channel.

New Jersey sought to defeat Delaware's claim by arguing that the construction of wharves and piers projecting into the river from the New Jersey shore past the low-water mark was inconsistent with Delaware's claim. This Court responded that the construction of these structures by riparian owners on the New Jersey shore indicated no abandonment of Delaware's claim of title to the low-water mark, however. The Court based this conclusion on the fact that riparian owners enjoy a right of access to a river which allows them to build wharves and piers even though the title to the bed of the river may reside in another state.



Kentucky's citation of this case in the present controversy is unavailing. Here, it is not the construction of the structures by private entities that Illinois and the Special Master rely upon as demonstrating Illinois' assertion of jurisdiction over a portion of the Ohio River. It is the requirement that before building these structures the owners must obtain an Illinois permit pursuant to a statute regulating construction within "the public bodies of water within the State of Illinois".

### C.

The supplemental materials submitted by the parties support the conclusion that Kentucky has failed to meet its burden of proof on the issue of acquiescence.

Following oral argument before the Special Master, both parties submitted additional documentary evidence at the Special Master's request. As he observed in his Report at page 37, the most impressive and significant aspect of this supplemental material was the lack of taxation by either state of the vast majority of structures and buildings extending from the Illinois shore into the Ohio River.

Illinois identified 15 such structures built on its shore and extending into the river. Filings No. 56-58. The only one definitely taxed by Illinois, however, is the Bunge facility located in Alexander County, Illinois. According to the Alexander County supervisor of assessments, an attempt was made in 1979 to locate the low-water mark relative to this structure. As a result, it was determined that of the 170 feet extending past the shore, the first 70 feet were north of the low-water mark and subject to tax in Illinois. Filing No. 56, Exhibit 64.

In Hardin and Callatin counties, Illinois, the taxing officials are uncertain as to whether such structures are being taxed. Filing No. 57, Exhibits 98 and 103. In addition, the Hardin County supervisor of assessments also



stated that she has not included on the tax roles a partially constructed barge loading facility begun during her term of office due to her uncertainty as to the boundary's location. Filing No. 57, Exhibit 98.

In discussing this evidence, Kentucky claims that the failure of Illinois taxing officials to tax all 15 of these structures is clear-cut evidence in support of its claim of acquiescence. Exceptions at 33. Illinois acknowledges that if the record showed Kentucky to be taxing those portions of all 15 structures that extend into the Ohio, Kentucky's point would be well taken. In fact, however, Kentucky claims to tax only one such facility, the Electric Energy Power Plant, near Joppa, Illinois. Filing No. 61, Exhibit 93. Although Kentucky has attempted to tax a 250 feet conveyer owned by the Bulk Service Company and located at Mound City, Illinois, Filing No. 61, Exhibits 86-92, Bulk Service has protested that assessment on the ground that its property is located in Pulaski County, Illinois, not Kentucky. Filing No. 61, Exhibit 87.

Rather than showing a continuous assertion of jurisdiction over the entire Ohio River as Kentucky claims, the evidence regarding taxation shows instead that a kind of taxing "no man's land" exists based on uncertainty in both states as to the boundary's true location. This uncertainty is totally incompatible with a finding of acquiescence.

Similarly, the other supplemental materials submitted by Kentucky fail to support its case. Mineral leases granted by Kentucky counties, for example, which are limited by their terms to the territory "within the boundaries" of those counties in no way identify where the boundaries of those counties might be. See Filing No. 61, Exhibits 117-119. Likewise, Kentucky's other evidence regarding taxes on barges and ferries, fishing and boating licenses, and old newspaper articles fails to establish Kentucky's claim to the boundary it asserts in this case, and as a result its boundary remains the 1792 low-water mark.

## D.

## Laches.

Kentucky continues to assert laches as a separate defense. As noted by the Special Master at pages 41-42 of his Report, however, a boundary dispute such as this is essentially a dispute between sovereigns, *Rhode Island v. Massachusetts*, 12 Pet. (37 U.S.) 657 (1838), and as such laches is unavailable. *United States v. Summerlin*, 310 U.S. 414, 416 (1940). Instead, the equitable principles inherent in the defense of laches are made applicable to the sovereign through the defense of acquiescence.

Furthermore, the basis for Kentucky's defense of laches is precisely the same as its defense of acquiescence and is equally flawed. The faulty premise underlying both is that Illinois has waited 168 years to claim the 1792 low-water mark and that this has resulted in surprise and disadvantage to Kentucky. In order to establish this premise, however, Kentucky would have to establish that it has continuously claimed a boundary other than the 1792 low-water mark since Illinois' admission to the Union in 1818, and this it cannot do.

As repeatedly pointed out, Kentucky has *never* claimed the boundary it asserts in this litigation in any formal sense either before or after 1818, with the exception of its briefs in this case and its earlier litigation with Ohio. Instead, beginning with its argument before this Court in *Indiana v. Kentucky* in 1890, and continuing through *Perks v. McCracken* in 1916, Opinion No. OAG 63-847 issued by the Kentucky Attorney General in 1963, and Information Bulletins Nos. 81 and 93 issued by the Kentucky Legislative Research Commission in 1969 and 1972, respectively, the only boundary Kentucky has ever formally acknowledged has been the 1792 low-water mark. When these sources are considered together with the decisions of this Court in *Indiana v. Kentucky*, *Henderson Bridge Co. v. Henderson City*, and *Ohio v. Kentucky*, it is simply impossible to give any credence to Kentucky's

plea that it has been surprised or disadvantaged by Illinois' claim to the same boundary that Kentucky and this Court have both recognized for 100 years.

### E.

#### **Accretion, erosion and avulsion.**

Although originally set out in Kentucky's Answer as a separate defense, Kentucky now takes the position that the principles of accretion, erosion and avulsion will only be applicable to the Illinois/Kentucky boundary if it prevails on its defense of acquiescence. Exceptions at 48.

### III.

**THE CONSTRUCTION OF DAMS ON THE OHIO RIVER HAS PERMANENTLY RAISED THE LEVEL OF THE RIVER ABOVE ITS LEVEL IN 1792 SO THAT THE PRESENT LOW-WATER MARK IS FARTHER NORTH THAN THE LOW-WATER MARK IN 1792.**

Although in its Answer Kentucky denied any effect on the level of the river resulting from the construction of dams, it now grudgingly concedes that "the effect of the dams was to raise the level of the water and that some changes may have occurred in the shoreline." Exceptions at 49.

Kentucky continues, however, to make no direct concession as to the effect of the dams on the low-water mark itself. In fact, however, the affidavits of William Kreisle, Filing No. 41, Exhibit 1, David Beatty, Filing No. 41, Exhibit 2, and Kentucky's own witness, Dr. Petersen, Filing No. 61, Exhibit 156, together with various maps submitted or referred to by both parties, see Filing No. 44, make it unmistakably clear that the 1792 low-water mark is south of the existing low-water mark.

---

**CONCLUSION**

Illinois submits that the conclusions of the Special Master are fully supported by the record and that his Recommendations should be adopted by this Court.

Respectfully submitted,

NEIL F. HARTIGAN  
State of Illinois  
*Attorney General*

JOHN BRUNSMAN  
*Assistant Attorney General*  
500 South Second Street  
Springfield, IL 62706  
217-782-9062  
*Counsel of Record*

